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No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, Warden, Sussex 1 State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
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Q Thank you. You said that Mr. Williams and the family members gave you some names. As far as you can recollect, do you think either you or Mr. Motley either got in touch with these people or at least attempted to get in touch with all the names he gave you?

A Yes. I know we got in touch or attempted to get in touch with everyone that Mr. Williams told us about.

I remember talking with him several times, more than twice, about people. And they led us to family members, and I don't know if we got in touch with every single person the family members said get in touch with, but I think we tried.

* * *

[TESTIMONY OF DR. PAUL A. MANSHEIM]

[199] Q Were you asked to evaluate Mr. Williams [200] in terms of mitigation?

A Yes.

Q And what does that mean to you when you are asked to evaluate someone in terms of mitigation?

A In this case it meant could anything be uncovered that would persuade the Court that it would be appropriate to have a decreased penalty.

Q And did you evaluate Mr. Williams for mitigation?

A Yes.

Q And what process did you use to determine whether or not you could discover any mitigating circumstances?

A Mostly it was in talking with Mr. Williams himself. He told me some things he thought were important and relevant.

Q Did you go any further than that, like talking to other people or individuals to learn anything else that might help in mitigation?

A Not beyond reviewing the materials that were sent to me, and I didn't call his mother for example or his teachers in school or that sort of thing.

Q Do your records reflect who sent you materials?

[201] A Yes. As far as I can tell, everything that I had was sent to me by Mr. Fuller.

Q There is a letter that is probably in a stack, I know it is Exhibit 3, also, Petitioner's 3, from Mr. Fuller to you dated September 2, 1986. And I can bring this over, unless you maybe –

A I would rather you brought it over.

Q If you will take a look at this Exhibit 3 and tell me if you recall seeing that?

A Yes.

Q There is some information in this letter about Mr. Williams. And my question is, did you consider this information in your evaluation of Mr. Williams and in particular in your evaluation of mitigating circumstances?

A I don't have any record of having used it. In other words, I didn't refer to it in my report, and I don't have any independent recollection of having used it.

Q There is a sentence in there towards the end of the next to last paragraph that says: When the inmate asked if he was going to admit – the he I believe is referring back to Mr. Williams – is going to admit the murder in court, the defendant said, no, he was going to say he was insane. Do you recall if [202] that played a part in your evaluation of Mr. Williams?

A Well I can only assume that it made some impression. I mean, for somebody who is allegedly going to plead insanity about something, I guess that leaves an impression.

Q Is that significant that someone is actually able to articulate that they are going to plead insane, insanity?

A It may or may not be. Sometimes it means a person is sophisticated enough to know that that is a possibility. Sometimes it means that the person realizes that his own personal extensive psychiatric history has some bearing on the criminal case. Sometimes it is wishful thinking.

Q Sitting here today, do you recall what part that might have played in your evaluation?

A No, I don't.

Q Did anyone ask you to draw any opinions with regards to whether or not Mr. Williams would be a future danger or continuing threat to society?

A No.

Q And would it be correct to say that you didn't file any report on that issue, did you?

A That is correct.

[203] Q And you didn't discuss that issue with Mr. Motley or Mr. Smitherman did you?

A I have no recollection of discussing it with them. I assume if I had discussed it with them, they probably would have asked me some questions at one of the proceedings.

Q Do you recall having any discussion with Mr. Motley about what you thought of Mr. Williams and specifically that you thought he was a very dangerous person?

A No.

Q Do you recall putting that in writing?

A No.

Q Would you agree that your testimony on mitigation – first of all, let me back up. Do you recall your testimony on mitigation?

A No, not specifically.

Q Would it refresh your memory if I told you that you testified about Mr. Williams telling you he removed bullets from a gun during one incident and that he thought on another conviction that he was unfairly convicted?

A Yes, those are in my report, and I imagine I testified about those things, but I don't remember saying anything else about it.

[204] Q And that information you got from Mr. Williams, correct?

A Yes.

Q And you are just relating what Mr. Williams told you; correct?

A That is right.

Q There is no professional, expert opinion that you are drawing there, is there?

A I don't think anybody asked me to, but no, the answer to your question is no.

Q Did you have any information with regard to Mr. Williams' history in terms of his history of incarceration?

A I had a history that I got from Mr. Williams that told me about various convictions that he had, but I didn't have anything beyond what is in my report.

Q Did you have any information about whether in previous incarcerations he had been a model prisoner or something other than that?

A Did not have any information about that.

Q Did you have any information on his past history in terms of his family life and how he was raised and brought up by his parents?

A Yes, I had a little bit of that. I knew [205] that he had had a pretty chaotic family upbringing, I knew that there had been a family fight in which he had had a head injury when he was quite young. And I knew that he left school after having a pretty unsuccessful academic career, so I knew those things.

Q Did you hear or read anywhere that he had been mistreated as a child and beaten by his father?

A Yes – well I had the history that he was hit in the head with a chair wielded by his father-in-law at the time he was living with his wife. But I don't think I had anything specific about his biological father.

Q Did you have any information with regards to whether or not he was ever taken away from his parents when he was a child and put into foster care?

A There is nothing in my report about that, and I don't have any independent recollection of it.

Q Did you have any information in terms of his past employment?

A I think I did, yeah.

Q Did you get that information from Mr. Williams himself?

[206] A I remember something about Mr. Williams having some difficulty with employment, and I think that was in the material Mr. Fuller sent me, that he had lost a job for unsatisfactory performance on the job, I remember that.

Q Did you have any information about his past school history, his schooling?

A I knew from his account that he had a lot of difficulty in school and that there had been a number of grade failures, problems with reading, and he felt that school was a pretty unsuccessful experience for him.

Q Dr. Mansheim, have you ever heard of fetal alcohol syndrome?

A Yes.

Q And had you heard of fetal alcohol syndrome in 1986 at the time you were evaluating Mr. Williams?

A Yes.

Q Back in 1986 or around that period of time, had you ever diagnosed anyone with fetal alcohol syndrome?

A Yes.

Q Do you know if that was before or after you saw Mr. Williams?

[207] A It was before I saw Mr. Williams.

Q Did you have any information when you were examining Mr. Williams to lead you to question whether he might be a victim of fetal alcohol syndrome?

A No.

Q What information would have been pertinent to you in order to raise a red flag for you that maybe you should evaluate him for that?

A Probably the most pertinent information is that the person has some facial abnormalities. There is a sort of – the nasal folds are peculiar and the lips are rather thin.

Q Would you agree that that type of abnormality is easier to see in a younger person than an older person?

A I think it is relatively easy to see whatever age person it is. I am not very good in recognizing these facial syndromes, but even I can see if there is something there. It is pretty obvious.

Q Does it always have to be that obvious where fetal alcohol syndrome is concerned?

A As far as I know, if they don't have the facial abnormalities, then it is not fetal alcohol [208] syndrome. Otherwise it would just be a question of judging fetal alcohol syndrome on the basis of history of alcoholism in utero and history of some cognitive difficulties or below-average intelligence. To me that would be pretty non-specific.

Q Did anyone give you information about whether Mr. Williams' mother had drank substantial quantities of alcohol while Terry was in utero?

A Right. There is nothing in my report about it, and I don't have any independent recollection of it, so I think the answer to that is I didn't know.

Q Are you saying that at the time you examined Mr. Williams you did not see any evident facial abnormalities that would lead you to that diagnosis?

A No, I did not.

Q If someone had told you that his mother had drank quite a bit, would you have done anything different in your evaluation?

A I certainly would have thought about the possibility of fetal alcohol syndrome. I probably would have at least looked up and gone as far as looking up in a textbook exactly what the agreed upon [209] diagnostic criteria are. And I hope would have brought it to the attention of the defense attorney.

Q Would you consider if you had a diagnosis of fetal alcohol syndrome that that would be significant for mitigation purposes?

A I think it would be a matter of the Court's judgment as to whether it was, but it would be something one could bring to the attention of the Court and let the Court consider it.

Q In your opinion, can psychiatrists or psychologists or other experts predict future dangerousness or future threat to society with any degree of certainty?

A I think if it is properly limited. For example, if it is a question of peoples past history or behavior in certain situations, frequency of offenses, the nature of their offenses, their youth, their intelligence, their educational level, their training, their living in a stable family or home situation, their having some sort of investment in living a straight life, I think if it is a question of looking at those kinds of parameters, then I think it is possible for mental health professionals to say things about dangerousness that are relevant.

Q But you would agree that they cannot [210] guarantee that their prediction is going to be correct or accurate?

A No, no psychiatrist can guarantee a prediction about anything.

Q In terms of your diagnosis of Mr. Williams, do you recall what your final diagnosis was?

A I don't think I gave him a psychiatric diagnosis in the report. There are a number of psychiatric diagnoses that could be applied.

Q Do you recall giving a diagnosis of unsocialized aggressive conduct disorder?

A That would certainly be, that would certainty fit.

Q Is that a diagnosis that is usually reserved for children as opposed to adults?

A It is usually used in children, but the diagnostic criteria for an antisocial personality disorder are so specific and so strict that one encounters people who have had a lot of trouble with the law that they don't fit the criteria for antisocial personality disorders.

It doesn't say – at least the last time I looked at the diagnostic manual – didn't specifically say that you couldn't use conduct [211] disorder for adults. But it is true that it is more often used for children.

Q Dr. Mansheim, just a couple more questions. In terms of the fetal alcohol syndrome, if you had had some evidence of Mr. Williams' mother drinking alcohol while she was carrying him, would you have consulted other experts in the field?

A Well as I said, I certainly would have consulted a standard text to find out what the agreed upon diagnostic criteria are. I don't know how much further than that I would have gone with it.

Q Are you aware that there are experts in the field that would have more expertise in fetal alcohol syndrome?

A Certainly.

Q Such as a geneticist?

A That would be one possibility or else the other thing would be to just look up in the literature and find

out who is writing all the papers and doing all the research and learn what university they are at.

Q What about a dysmorphologist?

A Dysmorphology, that is a relevant discipline.

Q Have you ever consulted a [212] dysmorphologist before?

A Not independently of a medical geneticist. There are a lot of people who do medical genetics are good at dysmorphology, so within that context, yes, I have consulted them.

Q Okay, you have contacted and consulted with geneticists?

A Yes, when I saw a patient that I thought had a dysmorphology or looked like they might have some sort of syndrome, yes.

Q And in terms of your discussions with Mr. Motley, you said you did talk to Mr. Motley before you testified?

A Yes.

Q Do you recall if you spoke with Mr. Smitherman before you testified?

A Yes.

Q Do you recall if you spoke with Mr. Smitherman before you testified?

A I don't remember.

Q Are you certain that when you spoke to them you did not give them any opinion on future dangerousness?

A No, I am not certain of that.

Q You are not certain of that?

A I am not certain of that.

Q But it is not reflected in your file or four notes; correct?

[213] A It is not reflected in my notes or in my report, and I assume it wasn't reflected in my testimony.

Q Sitting here today you don't recall giving them an opinion on that?

A No.

Q In fact, didn't you give an affidavit in this case one time at our request?

A I did.

Q And do you recall in that affidavit discussing whether or not you had been asked to look at future dangerousness?

A Yes, I think I said in the affidavit that I had not been asked to give any opinions about future dangerousness.

Q And you gave that affidavit in '88; correct?

A Yes, but even though it was only two years later, I have to tell you in all frankness that memory was still pretty cloudy even by then. Even in '88 I probably didn't remember a whole lot more than I remember now.

Q Do you think you would have remembered it least a little bit more in '88 than you do now?

A Probably, yes.

[214] Q And do you agree with your statement that you gave in '88 that if you were going to evaluate Mr. Williams on future dangerousness or continuing threat to society, you would have spent more time evaluating him, particularly on his history – medical, family, school, etcetera? Do you recall that?

A Yes, I recall that, and I still feel the same way. If someone had asked me to do a comprehensive evaluation on that, be prepared to go to court and testify and be cross-examined, I agree with what I said then, I certainly would look at lots of records, employment records, school records, all kinds of records.

Q So if you had said anything to Mr. Williams' attorneys about future dangerousness, it would have been without doing a full evaluation?

A That is true.

MR. MARTORANA: I have nothing further.

THE COURT: All right, Mr. Condon.

CROSS EXAMINATION

BY MR. CONDON:

Q Doctor, you found Mr. Williams competent to stand trial and not insane at the time of the [215] commission of the offenses; is that correct?

A Yes.

Q And whether you reviewed the Central State doctors' report which found the same thing, you have no disagreement with it?

A I don't have any disagreement with that conclusion, right.

Q I am a little confused. You said you diagnosed, you had a case of FAS before you examined Mr. Williams?

A Yes.

Q This is what confuses me, why would you have had to go review the literature if you had already had an FAS case?

A Right. What I said is, if I had seen some dysmorphology of the face that made me start thinking about fetal alcohol syndrome, and if I were going to come to court and testify about it, I would have boned up on it. I wouldn't want to come to court and be cross-examined and not know about it.

Q But you didn't mean that between the time you had been up on it and had diagnosed it prior to examining him that you had forgotten everything?

A No, not that I had forgotten anything, just that I had no piece of information about Mr. [216] Williams that would have led me to the diagnosis of fetal alcohol syndrome. And I think of facial dysmorphology as being the first thing you look for.

Q So you didn't see the cranio facial abnormalities that you had seen in the earlier case or that would have alerted you?

A That is right.

Q There is also another category, neurological abnormalities, you didn't find any of those, either, did you?

A No.

Q So there was nothing to alert you to FAS?

A Correct.

Q Do you have any idea when FAS became something that was common knowledge in your specific profession – not the medical profession, but your specific profession?

A No, that I don't.

Q Do you have any idea – it certainly was current, at least you were aware of it prior to Mr. Williams because you said you had diagnosed it?

A Yes, I had a case earlier than 1986.

Q Do you have any idea when it became common knowledge in the general medical profession or [217] in the field of obstetrics?

A I really don't.

Q Do you have any idea when it became common knowledge in the general public, laymen?

A No.

Q The second capital case that you had, is that the only other capital case that you have been involved in?

A In this sort of situation and in this court. I have been involved in lots of others but in different courts.

Q In the second case, you said you participated more fully?

A Right.

Q Did you testify in that case about lack of future dangerousness?

A I don't remember. I mean, I don't remember, but considering that I was involved in the discussion about whether the defendant was going to testify and a lot of other things that were kind of peripheral, I just can't believe that I wasn't asked questions about that.

Q In Mr. Williams' examination, you found what could be characterized as scant evidence of mitigation. In the other case that you handled and [218] that you participated in more fully, was there more in mitigation in that case?

A Right. Well the issue in that case or one of the issues was if the person were in a prison situation what my opinion was on the probability he would be dangerous.

Q So is it possible that one of the reasons you participated more fully in that case is because you had more to work with in that case vis a vis what you found after examining the patient?

A I had more information.

Q Well didn't you have more favorable diagnosis, didn't you have more in mitigation in that case?

A Well I am not sure I had a lot of information on Mr. Williams. In other words, I think it is possible there

might be a lot of information I didn't have. So I mean at the time that I testified, what I had was pretty small, a small amount.

Q And when you examined Mr. Williams, you were aware at least that he had been charged with a number of other offenses, not just a capital murder?

A Yes, I knew that.

Q Did you have any of the details of any of the other crimes?

[219] A Yes, I had the complaint report of Alberta Stroud and the report from the Memorial Hospital on Alberta Stroud.

Q Did you have any report on a man who had been stabbed, Mr. Solomon, had been stabbed and his house set on fire, an elderly man?

A Mr. Solomon?

Q Yes.

A I didn't list it in my list of things that I had when I did the report, so I can only assume that that means I didn't have it.

Q But in your report itself, you make note of the fact that he had prior felony convictions, '76 armed robbery and breaking and entering and grand larceny in '82? That is correct?

A Yes, I had all those things.

Q And you also knew something about his juvenile record, that he had been to reform school for stealing a bike, breaking windows, and other things?

A Yes, I knew that.

Q Now you are not sure whether or not you were asked about future dangerousness?

A Right.

Q Suppose you had been asked about future [220] dangerousness, based on the fact that this man has been to prison twice, and based on what knowledge you had from the reports regarding the capital murder, regarding the Mrs. Stroud, the facts surrounding Mrs. Stroud, and the other I believe there were a couple of grand larcenies, the reform school history, if you had that information, if you had been asked to give an opinion on future dangerousness, what would it have been?

MR. MARTORANA: Your Honor, I am going to object to that question. I think it is totally irrelevant to ask Dr. Mansheim what he sitting here today would have given as a diagnosis when he says he wasn't asked to do it and doesn't recall if he ever told anyone whether or not he had any opinion.

THE COURT: Isn't that the same thing you are doing to all these other things? You say if you had it, what would you say?

MR. MARTORANA: Your Honor, he said he didn't do a full work-up, he would have had more information and [221] would have done more on history. And, you know, what he is going to say today has absolutely no relevance as to what he would have told the attorneys back then or what he would have testified at trial if he had been asked.

THE COURT: I think it is probably important what he would have said then because I think that there are some things that were said. I think the question –

MR. CONDON: He may have said something.

MR. MARTORANA: Your Honor, that is not the way –

MR. CONDON: And I think we have laid a foundation for it through Mr. Motley and Mr. Smitherman.

MR. MARTORANA: Your Honor, I am not sure that that is what the question was. The question wasn't did you have an opinion back then, it is given this information today what he would you [sic] say.

[222] THE COURT: I think he is entitled to examine him along those lines.

Q I will ask it both ways, Doctor. Could you, based on that criminal history, do you have any doubt that you possibly could have said to the attorneys, even though you don't recollect the conversation, that if asked the question on the stand you would have to concede that he would be a danger in the future?

MR. MARTORANA: Your Honor, we would just like our objection noted for the record.

THE COURT: I will note your objection.

A Given the demographics that he was young and had a lot of difficulty with education, there is not a long-term career kind of situation, and that there was this string of violent crimes, I am sure if someone had said

what do you think would be the probability that Mr. Williams would commit another violent crime if he were out in the world, I am sure I would have said there was a high probability that he would commit another violent crime.

Q Is there any significance to the fact that in most if not all of these crimes, the victims [223] were elderly?

A Certainly.

Q Does that indicate anything in the way of future dangerousness or is that a factor to be considered that the preying is on elderly individuals?

A Well I am not sure that one can really go beyond the fact of extremely violent crimes. As I look at it, it is a big picture. And if a person has committed several violent crimes, that is one of the issues, not so much whether it is a preying situation.

MR. CONDON: Thank you, Doctor.

REDIRECT EXAMINATION

BY MR. MARTORANA:

Q Dr. Mansheim, you agree that you did not have all the information back in 1986, and you still do not have all the information today to give an opinion, reliable opinion, on future dangerousness in Mr. Williams' case. Do you agree to that?

A What I agree about is that I would hope that had I been asked to give a specific opinion about it that I would have gotten more information. I agree to that.

* * *

[226] mitigation if you had learned that Terry had had a difficult childhood where he was removed from the home and put in foster care for several years?

A I don't know that that would have been terribly relevant, no. That is a two-way sword. One can use that as an argument for non-mitigation, saying the person has had such a rotten life and doesn't trust anybody, why would he ever trust anybody again.

Or you can you say the person has had such a difficult life, why should his life be even more difficult by what goes on in court.

Q That is something that the attorney would have to make a decision on; correct?

A Yes.

Q Dr. Mansheim, just a couple more questions. In terms of the issue of future dangerousness and if you had been asked by Mr. Williams' attorneys to give an opinion, would it be correct that you would have spent a lot more time than an hour and a half with Mr. Williams to get more information in order to make that determination?

A I don't know if I would have spent more time with Mr. Williams, but I think I would have spent more effort on the background information.

[227] Q Would it be correct that You would have expected the attorneys to provide you with quite a bit more background on Mr. Williams?

A Yes.

MR. MARTORANA: I have no further questions.

RECROSS EXAMINATION

BY MR. CONDON:

Q Doctor, maybe I am confused, but aren't we confusing here in this latest discussion, things about background and home life, and things like that, isn't that more properly characterized as mitigation? How does that factor into future dangerousness? I mean, aren't we talking two different issues? If he goes to prison, gets out, commits another crime, goes to prison, then goes on a crime spree, sets a house on fire, stabs a man, beats an old woman into a vegetative state, commits a capital murder, don't you basically look at that when you are judging future dangerousness? How does his family background and home life, isn't that mitigation and not factors into future dangerousness?

A As I said, a bad home life is something that is on the RORSCHACH test. Somebody is going to look at it and say, this poor fellow had such a bad [228] home life you should be not so hard on him in court.

And somebody else is going to say, look at this fellow had a horrible home life, even his mother didn't love him, how are you going to expect him to be nice to citizens on the street.

Q But my point is, isn't that mitigation in the strict sense and not something that is relevant to whether he is going to be a danger in future?

A No, I think it is both. Just depends on how you look at it.

MR. CONDON: That is all.

THE COURT: Want to excuse the doctor?

MR. MARTORANA: Yes.

THE COURT: You may go.

* * *

[TESTIMONY OF DR. MILLER M. RYANS]

[231] A I just have my hospital – I have my whole file here, but I just have these where I could have ready access to them to answer the questions.

Q Like you to take a look at an exhibit which has been marked Petitioner 39 and see if you can identify that for us.

A All right.

Q Would you just take a moment to look through that if you could tell me if that is the file from Central State that has been kept on Terry Williams?

A Yes, this is the file for Mr. Williams, that is correct.

Q Do you recall today what tests were done on Mr. Williams while he was at Central State?

A Yes, I do.

Q Do you think you could quickly and briefly list them in terms of the various tests that were done?

A Yes, he was given sleep deprived electroencephalogram with nasopharyngeal lead. He was given a

neurological examination, he was given a skull film, he was evaluated psychologically by Dr. Centor and clinically by Dr. Centor and myself.

Q Let's take them one at that time. The [232] sleep deprived EEG with nasal – what was that other term?

A Nasopharyngeal lead.

Q What is that test, how is that test done?

A If the person is sleep deprived and also has these nasopharyngeal leads, the test becomes more sensitive to any type of brain damage as opposed to a routine – as opposed to a routine electroencephalogram without the sleep deprivation and nasopharyngeal lead. It is more sensitive.

Q Would that pick up a brain injury, that type of test?

A Yes, usually.

Q Usually but not always?

A Not always.

Q What about a brain tumor, would that pick up a brain tumor?

A Yes, it should be able to if there are any clinical ramifications like the person having severe headaches and dizzy spells or blackouts or seizures, it should be able to pick it up.

* * *

[237] it might have been if he had actually fallen asleep?

A All I can say is that is a possibility, but I can't say with medical certainty.

Q Do you know if you spoke with Mr. Williams' attorneys before you got involved with evaluating Mr. Williams?

A I don't believe I did. I don't recall speaking to them.

Q Do you know if you spoke with them before the day of the trial?

A I did not speak to them, no, I did not.

Q Going back to the tests that were done, the second one was the neurological examination. Can you tell us what that consisted of?

A Yes. We have a board certified neurologist, Dr. Sefthen, who performs these tests. What I do is make up the request, and then she carries out the neurological evaluation based on my request for consultation in the matter.

Q What type of tests did you do, do you know?

A Did Dr. Sefthen do?

Q Yes.

A Well she did a neurological test. I have her findings here. She went into – well I can [237] read it to you.

Q Maybe just briefly, just very quickly explain what the test consisted of.

A Well she does the test of pupils to see if they are equal and respond to light and accommodation. She does – yeah, it is in here. And she examines the fundus of the eyes. That is, the eye grounds, they can tell you quite a bit about any disease process or any increased intraocular pressure.

She does the reflexes. In this case she did the deep tendon reflexes, which includes the Babinski, and that tests his motor responses and his coordination.

And that is what her report says. I am just reading from the report. And her bottom line was normal neurological findings.

Q So those were the extent of the tests she did?

A That is correct; yes.

Q And the skull film, what does that consist of?

A It is just an x-ray of the skull that was done on August 7, 1986. Impression, normal skull.

* * *

[241] Q Can you tell from looking at your file what the social worker did in terms of his [242] responsibilities on the team?

A I have his report here. He filled out his social services initial assessment, and he just goes into the reason for admission, the health condition and housing situation prior to admission and income status.

That is all I have on what Mr. Lifsey, the social worker, did in this case. I don't know if he went beyond that.

Q Is there a date on that report?

A Yes, sir, July 29, 1986.

Q And what is the social worker's role on this team, can you tell us?

A He is supposed to collect background data if possible, and then if there is anything that we need to know, he is supposed to get it for us, if possible. I don't know back in '86, I have no idea what he collected other than this report here.

Q But you agree that report is fairly scant in terms of any information on it?

A Yes, I agree.

Q You have seen reports that have a lot more information, haven't you?

A Oh, yes.

Q And when you say background data, are [243] you talking about family life, medical history, social services?

A Yes. You know I have a little background, with my staffing I have a little background on this gentleman that I placed in there in regard to just in general what his background. You have my report there.

Q Before we get to that, just in terms of what the social worker is supposed to do. What type of background is the social worker supposed to look for?

A He is supposed to get a family background. If there is any background material available, he is supposed to check with the family, especially the parents,

wife if possible, children, whatever there is available, the social worker is supposed to get background information.

Q How does the social worker do that? Do you know?

A He is supposed to contact, he is supposed to talk to the patient and get names and addresses and phone numbers and try to make a connection to whatever the patient gives them.

Q Is there any indication that the social worker contacted Mr. Williams' family on his report?

[244] A There is no indication here. I am not sure whether or not it was, but there is no indication here that he did, because he is supposed to have a file background, social history, and I never found it in this case.

Q And then you mentioned that you had a report that had some background. Is there a date on that report?

A No. I just put down what he told me briefly about his past being at Hanover and Beaumont as a child and serving four years and eight year sentence for armed robbery which occurred in 1976.

He told me he hadn't previously been in a mental hospital or mental health clinic for psychiatric care. And to me he denied that he was using drugs or alcohol.

And I always ask the same question, whether or not they are suicidal for obvious reasons, and he denied being suicidal. That was the extent of my query into the gentleman's background.

Q And that report is dated July 30, 1986?

A That is correct.

Q And that is the one that has your name and Mr. Lifsey and Mr. Lee?

[245] A Yes, that is correct.

Q Now in 1986 were you familiar with fetal alcohol syndrome?

A Yes, I was familiar with fetal alcohol syndrome in 1986.

Q And when you say familiar, what were you familiar with in 1986?

A Well according to the fourth edition of the Comprehensive Textbook of Psychiatry, Kaplan and Sadica, there is an entry, it was '85. And it is delineated on Page 1022.

And they give the stigmata, the four stigmata of it. And that was available at that time. And clinically I was aware of children who had alcoholic mothers who drank while they carried them. And I saw firsthand the results of it.

Q And were you aware in 1986 that that was a significant condition that merited further evaluation and diagnosis?

A Yes, if the criteria were there it should be followed through. If you see the four criteria, then you have an obligation to carry through and see where it goes.

Q And is there information that if you had been provided you may have carried that further and [246] looked into it?

A Oh, yes. Part of that would be in the case, one of the criteria is low birth weight and the length of the baby, is it shorter than normal.

And there is nonspecific major or minor malfunctions of the joints. These kids are crippled, more or less, and they have central nervous system dysfunction in regard to memory and cognitive disturbances of speech and failure and motor activity and unable to recognize objects and disturbance in their executive functions, such as organizing, planning, sequencing and abstractions.

Those are the things that you would try to check out and see whether or not there was an existence at that time.

Q Is it your understanding that all those criteria have to be present or just some of them?

A Not really. I think the key is the history of the mother drinking while she is carrying the child, because alcohol crosses the placenta membrane into the brain of the baby and has a toxic or poison effect on the brain affecting the cognitive functions, the memory, the joints, even distinctive facial features of these children.

So it is quite obvious in these [247] cases. But it is all matter of degree as to how much alcohol passes the placenta membrane as to how much the baby will be affected.

Q If you had been given information that Mr. Williams' mother had drank quite heavily while he was being carried in utero, would that have led you to red flag that and do more evaluation?

A Yes. The first red flag, I would be certain to make sure that Dr. Sefthen, the neurologist, be aware of that.

And I am quite sure if she had that information, that would direct her, she would focus more in that direction. And I am quite sure that she would have ordered a brain scan to go with her workup, to delineate the situation. I am sure she would have minimally.

Q Anything else other than giving that information to Dr. Sefthen?

A Well, as I said, you know, we would go with the criteria, especially with the central nervous system dysfunctions that I just mentioned, any type of language disturbance, any type of motor activity that is impaired, his inability to identify objects, maybe pick up a pen, and the person is unable to say this is a pen or this is a ring, or [248] this is a wrist watch, that type of thing.

And they are unable to plan, organize, sequence, abstract. They are not concrete in their thinking, they can't think in an abstract manner. You have to check those out, there are tests that you can take.

Or you can even go into a more sophisticated psychological testing, Halstead-Reitan business, which would be more definitive if you suspect it.

But you have to have the suspicion, you have to have guidance of someone saying well this man's mother was drinking while she carried him. I never got that.

Q You would agree that you are not normally going to get that from the patient, him or herself?

A That is correct.

Q How would you normally get that information in this type of case? Would you normally get it through the attorneys?

A Well the attorneys are supposed to supply us with the background material, the significant background material.

Between the attorney and the [249] social worker, they are the ones that we rely on heavily to give us any information that we can't get ourselves.

You see, information that I received, I got it from Mr. Williams directly. But these things about his background, his birth, and his mother drinking, that would have to come from other sources, either from the attorney or the social worker. In this case we never got that.

Q Like to show you a couple of exhibits, Dr. Ryans.

A Sure.

Q Let me start with Exhibit 8; I think you have a different book over there. Exhibit 8, it is quite a few pages, let me see if I can direct you to a particular page in that exhibit?

Well I didn't count the number of pages in, but it is called a prehearing investigation, Danville Juvenile Court, maybe about ten pages into the exhibit.

A Danville Juvenile Court.

Q That is it. If you will take a look at the first page, that is the one –

MR. MARTORANA: Judge for your help in finding it, it is –

[250] THE COURT: Is it the prehearing investigation?

Q Yes.

A I have it.

Q And you will see the birth date down there of Mr. Williams, September 11, 1955?

A Yes, I see that.

Q If you look at the first and second paragraphs of that, and there is some indication that the children, several of the children of Mr. and Mrs. Williams had been drinking?

A Yes.

Q And were intoxicated, and that Mr. and Mrs. Williams themselves were intoxicated?

A Yes, I see that.

Q Is this the type of information that if you had had that would have led you to look further into possible fetal alcohol syndrome?

A Certainly.

Q And you have still got Volume 3 over there; correct?

A Yes, sir, Volume 3, yes, sir.

Q If you will turn to Exhibit 38?

A 38, okay I have it.

Q And Exhibit 38 is an arrest record of [251] Lula Snipes Williams, who I will tell you is Mr. Williams' mother?

A Yes, I have it.

Q If you go to the second page?

A Yes.

Q There is an indication she was arrested for possession of illegal whiskey?

A Yes, I am looking at it.

Q And if you will turn to the next two pages, again Lulas Snipes Williams, there is indication on neglect of infant child?

A Yes, I have it.

Q Are these the types of records that would have led you to look further into possible fetal alcohol syndrome?

A Certainly.

* * *

[254] Q Let me see if I understand. You talked about the fact that mitigation can also be separate from future dangerousness, but now you are going back to future dangerousness?

Let me just see if I can clarify this. Do you do an evaluation of mitigating circumstances, whether or not they factor into future dangerousness, but mitigating circumstances that might be able to be used at trial?

A Yes.

Q Is there a report that goes through any mitigating circumstances that were found by the team that evaluated Mr. Williams?

A I don't quite understand what you are saying. You have Dr. Centor's report that initially said low probability. Is that what you are referring to?

Q That is one report that I did want to talk about. But is there any report that says, Here are some mitigating circumstances that we found that we think you should know about?

A No, I don't think the report had anything of that nature in it.

Q Is that something that you would do? Is [255] that your role to find mitigating circumstances and list them in your report?

A Yes, the best we can, when they are available.

Q And because they are not listed in your report, would it be correct to say that they were not available in this case?

A That is correct.

Q And how do you learn about mitigating circumstances?

A Through the investigatory material which is furnished by the attorney and the social worker.

Q And by the attorney, would that be the defendant's attorney?

A That is correct.

Q So you expect the defendant's attorney to provide you with quite a bit of material?

A Yes.

Q And you have done these cases before where defense counsel provide you with material?

A Oh, yes.

Q And did you have any material in this case from the defense attorneys?

A In retrospect, looking back, hindsight, I don't think that we had a whole lot of background [256] material in this case.

Q Did you have any background material from Mr. Williams' attorneys?

A I am not aware that we did.

Q Now you drew an opinion or Dr. Centor did in his report and you agreed that there was a low probability of a continuing threat to society; correct?

A Yes, initially.

Q And did you at some point change that opinion?

A That is correct.

* * *

Q If you would take a look at this document that has been marked 48, documents, they are three reports, one dated August 11, 1986 from Dr. Centor to E. L. Motley?

[257] A Yes.

Q One dated June 27, 1986 from Dr. Centor to Mr. Motley?

A Yes.

Q And another one dated September 10, 1986 from Dr. Centor to Mr. Motley?

A Yes, I have it.

Q Another one dated September 10 from Dr. Centor to Judge Ingram. If you will look at the first one to Mr. Motley?

A Yes.

Q In the last paragraph, this is your initial determination of low probability of future danger; correct?

A Yes.

Q And it says there are no mitigating factors for your client. Is that what you were just testifying about that you didn't have any information on mitigating factors?

A That is correct, yes.

Q When Dr. Centor sent this letter to Mr. Motley, do you know if Mr. Motley responded with providing you with any mitigating factors?

A I am not aware that there was any mitigating factors submitted.

[258] Q And it goes on to say that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence?

A Yes.

Q I missed a few words. It says that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence. What was his psychological makeup that is being referred to in this letter?

A That was the overall clinical evaluation. We go back and determine previous acts of violence, if there are any. And if there are not any that we are aware of, then we offer the opinion that there is a low probability of future dangerousness based on the material that we have at that point in time, which shows that the person basically, other than the act for which he was charged with at that time, was basically not the violent type.

Q Now this doesn't say that it is based on his past conduct or past criminal conduct, it says his psychological makeup?

A Yes.

Q Is there a difference between his past [259] criminal conduct and the psychological makeup?

A Usually they are related. However in this gentleman's case, and Dr. Centor did the psychological evaluation, and in the opinion of Dr. Centor, and he explained to me why based on his testing there was a low probability of future dangerousness because of the findings of his psychological testing.

Q And the psychological testing were the testing that Dr. Centor did?

A That is correct.

Q And what testing did Dr. Centor do?

A He did the RORSCHACH or the inkblots, he did the Bender-Gestalt, which takes organicity. He did the WAIS, the Wexler Adult Intelligence Survey.

And there is a list of the others, but those are the three main tests which Dr. Centor performed on this gentleman. And I think he did it on more than one occasion, so he was quite satisfied with the findings.

Q So is it your understanding of this report which you agreed to of Dr. Centor, that the psychological makeup that he is referring to basically comes from running these three tests?

A That is correct, yes.

[260] Q Now there came a time where you testified at the penalty phase of the capital murder trial for Mr. Williams; correct?

A Yes.

Q And at that time you were asked I believe by the Commonwealth whether you believed there was a probability of Mr. Williams being a continuing serious threat to society?

A That is correct.

Q And at that time you testified there was; do you recall that?

A Yes. From the time that we formulated the opinion, we became aware of information that was not available at that time which made us aware of an act of

violence which was perpetrated by Mr. Williams, which threw a different light on our findings.

Q Well would you agree that when you became aware of that, the psychological makeup had not changed?

A No, the psychological makeup had not changed.

Q And the testing that you ran to determine that psychological makeup had not changed?

A That is correct, had not changed.

[261] Q Now the Commonwealth called you. Do you recall speaking with Mr. Fuller and telling him that you had changed your opinion and you did believe that there was a future danger, that Mr. Williams was a future danger?

A No, what happened was, we were, as I said, after we formulated the letter based on the psychological testing, then we became aware of some information that was not available to us at the time, which I explained, and which threw a different light on the concept of future dangerousness based on the information that we were supplied after we had initially given a low probability estimate.

Q Do you know who supplied you with that information?

A I cannot recall. The only person I believe that would make us aware of any other information most likely would be either Mr. Fuller or a member of his staff.

Q And did you know that Mr. Fuller was going to call you to ask you your opinion on this matter?

A You mean as part of the testimony?

Q As part of the testimony?

A Yes.

[262] Q In the sentencing?

A Yes, sure.

Q So you had a discussion with him before you took the stand in terms of what your opinion was in this matter?

A Yes.

Q And did you tell him that you had changed your opinion from low probability to a high probability?

A Yes, based on the information that we received after, as I said, about an act of violence that was carried out.

Q Do you recall when you had this discussion with Mr. Fuller? Was it before you got to the courthouse the day of the trial?

A I don't think it was before I came to the courthouse. My recollection, but I can't be certain, but I believe that it was after coming to the courthouse. I may be mistaken, but that is my recollection.

Q But before testifying; correct?

A Yes.

Q Do you know if you had a discussion with Mr. Motley or Mr. Smitherman regarding your change of opinion?

[263] A I don't recall having a talk with Mr. Motley.

Q You don't recall whether you did or didn't, or you don't recall having it?

A I don't believe I did.

Q You already testified as to competency at the time of confession. Do you recall that?

A Yes.

Q And is that, for you to make a determination of competency at the time of confession, is that different than competency either at the time – competency to stand trial?

A Yes.

Q And is it different than insanity at the time of the offense?

A Two different things we are talking about.

Q Did you know when you were evaluating Mr. Williams that you were going to be asked to comment on his competency to give a statement?

A To give a statement at his confession?

Q Right.

A Yes.

Q And who told you that you were going to be called upon to do that?

* * *

[265] Q Well did you evaluate Mr. Williams for competency at the time of the confession?

A Yes. Well the investigatory material that was provided for us, we go over it very carefully and talk about it. And we ask ourselves these questions, whether or not at the time the person made the statement, whether or not they were incompetent or whether or not they were psychotic or whether or not there was evidence that the person was out of touch with realty or was not able to understand what he or she was saying at that point in time. Then we conclude after reading the statement, we come to a conclusion.

Q You have testified before in sentencing phases at capital murder trials other than the Terry Williams case, haven't you?

A Oh, yes.

Q Do you know how many cases you have testified in?

A I would say a minimum of maybe – this is a ball park figure, at least a dozen.

Q Have you been called upon in those cases to testify about whether or not you believe the defendant is a future danger?

[266] A Yes, we have to give that opinion.

Q Have you ever been asked whether a defendant would be a future danger in a structured setting such as prison?

A Yes, I have been asked that, yes, I have.

Q You weren't asked that in this case, were you?

A I don't believe I was.

Q Do you know if you had an opinion as to whether or not he would be a future danger in prison?

A In my opinion of Mr. Williams, if he were incarcerated, in my opinion I don't see where he would be dangerous in the future if he were incarcerated.

* * *

[CROSS EXAMINATION]

[269] Q But isn't it – and I have tried to clarify this once before today – isn't if somebody had alcoholic parents or problems in the home, isn't that more mitigation, evidence of mitigation and not relevant to whether or not he is going to be a threat in the future?

A That would be more mitigation, yes.

Q Isn't what is relevant to future dangerousness his criminal background, isn't it?

A That is what we focus on.

Q Isn't that the primary thing?

A Yes.

Q So background, when we say background, it would mean the mother was an alcoholic or the father beat him or the father left home or something like that, that is more in the line of mitigation, not future dangerousness?

A Yes, that would be more mitigation.

Q They showed you or they referred you to a warrant in March, '56 where the petitioner's mother was convicted of possession of illegal whiskey.

Since the petitioner – and you said that that was relevant. Since the petitioner [270] was born in 1955, how would that be relevant?

A This happened in '56?

Q The warrant is 1956, March, '56?

A He was born in '55?

Q Yeah. How would that be relevant? I was confused on that. In regard to FAS, how would that in any way be relevant?

A No, it was just, shows he comes from an unstable family background. That is all we were saying.

Q But I think you said it might have been important in alerting you to looking for FAS.

A Yes, that is a possibility if his mother was involved in alcohol, but I would have to have proof that she was while she was carrying him was drinking.

Q If the warrant had been before he was born, that would have made sense, wouldn't it?

A But it was after he was born, yes.

Q Do you consider yourself an expert on FAS?

A I am not an expert on it, but I am aware of it. Clinically I know of it.

Q In your field, you are qualified to speak to it?

[271] A Yes, certainly.

Q Aren't there certain characteristics that you look for?

A Yes, as I think I already pointed out.

Q Yeah, I wanted to ask you about that. Isn't there one category called craniofacial abnormalities?

A Yes, they are called cluster facial abnormalities. Yes, that would be one.

Q And another one neurological abnormalities?

A Yeah, neurological – there are central nervous system dysfunction, neurological abnormalities.

Q Now did you find any craniofacial abnormalities?

A I found no craniofacial abnormalities. As I said, the one thing I found was his right eye, his strabismus is averted outward that I noticed. That was the only thing I noticed unusual.

Q Do you know from your own knowledge whether that is one of the criteria listed under craniofacial abnormalities?

A No, we are talking about nasal labial folds altered to where it is noticeable, not the [272] usual facial appearance.

Q So the answer is what you saw was not one of the criteria under the craniofacial abnormalities?

A That is correct.

Q Neurological abnormalities, I believe you have used the word organicity in past conversation?

A Yes.

Q If we are looking for neurological abnormalities, did you find any of those that would have led you to think that he had FAS?

A No. As I said, the tests we ran and then also clinically we didn't see any things like malformation of joints and cluster facial abnormalities.

We didn't have his birth weight or his length, which would be below normal. And central nervous system dysfunction, they mention specifically memory impairment and cognitive disturbance. That is language disturbances, impaired motor activities, unable to recognize objects, disturbance in executive function, that is, they are unable to plan, organize, sequence, or abstract.

We didn't find any of those [273] things that we were aware of at that time that came to us.

Q Well except for the birth weight, wouldn't your testing have found that other stuff, everything else you listed?

A Yes, if it were really significant it would turn up in the neurologicals of Dr. Sefthen's, the neurological examinations, the electroencephalogram or the skull film or in Dr. Centor's testing.

Q So is the bottom line then, nothing showed up?

A That is correct.

Q So can you state within a reasonable degree of medical certainty that in your opinion he does not have full-blown fetal alcohol syndrome?

A That would be my opinion.

Q Okay. And would that have been your opinion in 1986?

A Yes.

MR. CONDON: No further questions.

* * *

[TESTIMONY OF DEBRA GRANT]

[279] **DIRECT EXAMINATION**

BY MR. POWERS:

Q Mrs. Grant, I represent Terry Williams in this proceeding. I am just going to ask you a couple of questions, and I would ask you to speak up because your voice is being transcribed by the court reporter, and it will help her. Okay?

A Okay.

Q Could you please state your address?

A 135 Chatelene Avenue.

Q And did you live in the vicinity of Henry Street for a period of time?

A Yes, I did.

How many years did you live on Henry Street?

A About fourteen.

Q In what proximity were you to Mr. Stone, the decedent? Where was your house and where was his house?

A Across the street.

Did you know Mr. Stone?

A Uh-huh.

Q And he was also known as Schooner?

[280] A Uh-huh.

Q Did you know him well?

A Yes, I did.

Q Was he a friend of yours?

A Yes, he was.

Q Did you also know Mr. Williams?

A Yes, I did.

Q Was he a friend of yours?

A Yes, he was.

Q Now you testified at the trial in 1986, didn't you?

A Yes, I did.

Q And you were called by the attorneys for Mr. Williams?

A Yes, I was.

Q Were you contacted by those attorneys before you testified, before the day that you testified?

A No, I wasn't.

Q How did it come about that you testified that day?

A I was here at the trial, and at the last minute they asked me to come up and speak on the part of how he was friendly.

Q About how -

[281] A Mr. Williams was.

Q Was friendly?

A Uh-huh.

Q And had you approached the lawyers for Mr. Williams and said that you had some information that could be relevant to this case that day?

A No, I didn't.

Q Did Mr. Stone drink a lot?

A Yes, he did.

Q And when he drank, did he often drink to excess? In other words, did he drink to the point that he was drunk?

A Yes, he was.

Q And when he got drunk, what would happen to him?

A He would pass out.

Q Was this a regular occurrence?

A Practically every day.

Q Did he ever, did you ever witness any times where Mr. Stone fell?

A Yeah, he fell down the steps once.

Q And when did that happen in relationship to his death?

A I say about a week or two before his death.

* * *

[TESTIMONY OF DR. ARTHUR CENTOR]

[296] Q That is Exhibit 48, you may hold onto those. Do you recall whether or not you ever spoke to Mr. Motley or Mr. Smitherman prior to evaluating Mr. Williams? And maybe I should back up and ask you do you know who Mr. Motley and Mr. Smitherman are?

A I know – I met Mr. Smitherman today. I do not recall having ever spoken to him. I knew Mr. Motley from before, but I can't tell you whether I did talk with him or not. Probably had a few words with him.

Q Would your file, would the Central State's file reflect if Mr. Motley had communicated with you and sent you information?

A It wouldn't reflect that.

Q Well if he had sent you a letter, would that be kept in your files?

A It might be in the hospital file, but it wouldn't be in my report.

Q Let me show you Exhibit 39 which I believe are the hospital files and see if you recognize those.

A These are Central State's.

Q The Commonwealth and defendant have stipulated that these are documents received from Central State, and I just, if you could briefly [297] look through that?

A Why don't you help me. Are there any reports from Mr. Motley?

Q I didn't see any letter in here. I guess my question is, would it have been kept in the files?

A It would have been kept in these files.

* * *

[298] Q Do you recall ever meeting with Mr. Motley before the trial?

A I have no recollection whether I did or did not.

* * *

[305] Q What about the capital murder case, do you recall speaking to Mr. Fuller before trial?

A I don't remember it, but I am reasonably sure that I did.

Q Why are you reasonably sure you did?

A Because that is usual procedure.

Q Now in your August 11 letter to Mr. Motley, let you see that again, I have it right here, Exhibit 48, if you look at the last paragraph on the first page, starting from the third sentence:

It is therefore our opinion that though there are no mitigating factors for your client, that the psychological makeup is such that there is a low probability that he would commit criminal acts of violence that could constitute a continuing serious threat to society.

A That is correct.

Q Do you recall giving that opinion?

A After refreshing my memory by reading this report, yes.

Q Was that just today or did you read it at some earlier date?

A This was part of the material that was sent to me.

[306] Q So you read it a few days ago?

A That is correct.

Q Do you recall your testimony at trial with regard to the issue of future dangerousness?

A Which trial are we talking about?

Q I am talking about the capital murder case?

A The issue of future dangerousness?

Q Yes.

A I am sure I did.

Q Do you recall it?

A Not exactly.

Q Do you recall that your opinion during the trial was different than your opinion here in this letter of August 11, 1986?

A Yes.

Q And you recall that you found that there was a high probability of a continuing threat to society; correct?

A That is correct.

Q Now in terms of your opinion that you gave at trial, do you recall if you told Mr. Fuller that you had changed your opinion before you got up to testify?

A Yes.

[307] Q And you did tell him that?

A I am reasonably sure that I did, without being certain.

Q Do you recall if you told Mr. Motley or Mr. Smitherman that you had changed your opinion?

A I have no recollection of that. I have no recollection of whether I did or did not.

Q Do you recall speaking to Mr. Motley before trial?

A Have no recollection of that.

Q You seem to have a clear recollection that you talked to Mr. Fuller; is that correct?

A I have a recollection. I don't know how clear it is, but I do have a recollection of it.

Q Do you recall that the Commonwealth called you as a witness?

A That is correct.

Q And since you changed your opinion, would you say that you – and the Commonwealth called you on that issue – that it is likely that you did tell Mr. Fuller that you had changed your opinion?

A That is correct.

Q Now in terms of your finding of low probability of future dangerousness?

A Yes.

[308] Q This report indicates that there are no mitigating factors but that his psychological makeup is such that there is a low probability that he would commit criminal acts of violence. Do you see that?

A Yes.

Q And what test did you do or what did you do to determine what Mr. Williams' psychological makeup is?

A This is, the RORSCHACH, and I see here was a repeat RORSCHACH, RORSCHACH being the inkblots test. But this in combination with the materials available to us at the hospital at the time of his behavior while incarcerated and while not incarcerated.

Q Well it talks about a psychological makeup, and you are saying part of a psychological makeup is information you have on his incarceration?

A Period of incarceration, right, and any reports from probation officers.

Q Do you have a recollection of Mr. Williams, history of incarceration and how that would factor into the low probability that you first stated in your report of August 11?

A In going through the hospital records that I glanced through previously, there were reports [309] in there of previous incarcerations and other reports, social work reports, of his behavior before and after incarceration.

Q And do you recall –

A I don't recall exactly, no, but I know that they were there.

Q And in terms of your final – not your final opinion, but your opinion on August 11, do you generally recall what those records show about his incarceration?

A That he was nonaggressive, he was not dangerous, not violent.

Q You have testified at a number of capital murder trials, haven't you?

A That is correct.

Q Do you know how many you have testified at?

A At this moment, no. I used to keep a record, but there are about twelve, something on that order.

Q I jumped right into this and I didn't ask you some preliminaries. Let me just back up for a minute. Are you still working for the state today?

A No. Let me just add, I am not licensed in the state anymore. I am in Minneapolis, and I let [310] my Virginia license lapse.

Q And are you now practicing in another state?

A No, I am completely retired.

Q When did you retire?

A When did I retire? I retired from the state in 1988 and then did private work for the courts and for the private sector until the last one I believe may have been in January of 1994.

Q Now in terms of your testimony at other capital murder cases, have you testified on future dangerousness in other trials?

A Yes.

Q Would you say you testified in all those twelve that you indicated?

A Well, if I testified in a capital murder case, yes, I testified about future dangerousness generally.

Q And have you been asked at some of those trials whether or not the defendant would be a future danger in a structured setting such as a prison or correctional facility?

A In many of them, yes.

Q And were you asked that at the Terry Williams trial?

[311] A I don't believe I was.

Q Do you recall if Mr. Motley asked you not on the stand but asked you at any time whether or not Mr. Williams would be a future danger set in a structured setting?

A I have no recollection of it.

Q Do you know if you would have had an opinion back in 1986 if you had been asked that on the stand whether or not Mr. Williams would be a future danger in a structured setting such as a correctional facility?

A I would have had an opinion if I had been asked.

Q What would your opinion have been?

A My opinion would have been, and I would have so stated that in a structured environment he would not be of future danger, he would not be hostile or violent or commit crimes, not likely to commit such acts of violence that he would be a danger to that society in a structured environment. And that would include other inmates and administrative personnel and guards.

Q In terms of that opinion, is that generally the opinion you would give, that you have given when you have been asked that at other cases?

[312] A No.

Q What has been the opinion you have given when asked that in other cases?

A That such individuals would also be a danger to society in a structured environment.

Q So would you say that Mr. Williams was somewhat unique in that he would not have been a danger in a structured environment?

A He would not likely have been a danger; you would have a low probability.

Q Low probability. Would you say that is somewhat unique?

A That would be somewhat unique, quite unique. Let me say quite unique.

Q Okay, thank you. Do you recall, let me ask you this, normally in your evaluations do you ever review the background of an individual in terms of – I know you have said you look at incarceration, would you also look at schooling, medical, family life, things of that sort?

A On reports of those. That is, usually the social service worker will gather those bits of information, they become part of the record, and those are reviewed.

Q And why do you review those, how do you [313] use that in your analysis?

A As some indicator of the individual's past history, which is one of the better indicators for future behavior.

Q Now you said you did have some indication in terms of past records and incarceration?

A That is correct.

Q Do you recall if you had any information in terms of any other past history of Mr. Williams?

A Not that I can recall, but there probably was or very likely there was enough information to come to the conclusion that there was a low probability that he would commit criminal acts of violence.

That is, this opinion was not based solely on psychological testing and interview. It was based both on the psychological tests and the material available to us of past behavior.

Q Incidentally, when you were appointed, did you consider yourself as appointed for one side or the other, the defendant or the Commonwealth?

A No, there is no such appointment.

Q You were appointed as a neutral, would you say?

[314] A That is correct.

* * *

A That is correct.

Q And did you feel free to discuss your findings with either Mr. Motley or Mr. Fuller?

A That is correct. As a matter of fact, separate report. I do believe, and I believe your associate Ms. Tarlow indicated to me that in July of 1986 the law, the statutes changed so that a separate report would go to the defense containing information that did not to go [sic] the Court or the Commonwealth attorney. And this report reflects that.

Q This report meaning the August –

A A separate one to Mr. Motley.

Q But you did state that you did speak to Mr. Fuller about the probability of future dangerousness before trial?

A No, not at this time.

Q But at what time – before trial; correct?

A No – well before trial but after a conviction on – I am pretty sure that was so the case, of an assault and battery or on an individual in Danville, a trial which took place I seem to remember a very short time before the capital murder case when I was apprised of his conviction.

And that became a matter of fact rather than an allegation. Once it was adjudicated, [315] then the opinion changed.

Q And you communicated that with Mr. Fuller?

A When he notified me that he was indeed convicted of that charge.

Q Mr. Fuller notified you of that and asked you, does this change your opinion?

A I believe that is what happened.

Q And at that time as best as you can recall you told him, yes, it does change your opinion?

A Yes.

CROSS EXAMINATION

BY MR. CONDON:

Q Dr. Centor, I will be very brief. Are you familiar with the condition fetal alcohol syndrome?

A Only since I read about it in this material and very little since then.

Q Well back in 1986 when you did this examination, did you know anything about it?

A No, sir.

Q If I told you that one of the criteria, one of the recognized criteria is neurologic abnormalities, did you find any neurologic abnormalities in Mr. Williams?

A None in the test material that I gave him, and I did give him apart from the Wexler Adult Intelligence Scale Revised and the RORSCHACH and Bender-Gestalt test for organicity or brain damage affecting intellectual functioning, I found no signs in those tests.

He was also given a neurological exam by a neurologist, and that report came back. There were no neurological abnormalities.

* * *

[TESTIMONY OF LULA WILLIAMS]

DIRECT EXAMINATION

BY MS. TARLOW:

Q Mrs. Wiiliams, can you state your name please for the record?

A My name Lula Williams.

Q And what is your address?

[329] A 202 Henry Street.

Q And are you employed?

A Dibrell Brothers, seasonal work.

Q How old are you, Mrs. Williams?

A Seventy years old.

Q How far did you go in school?

A 3rd grade.

Q Did you say 3rd grade?

A 3rd going into the 4th, but I didn't make it.

Q What is your relationship to Terry Williams?

A My son.

Q How old were you when you had your first baby, Mrs. Williams?

A 15.

Q And how many children have you had altogether?

A Fourteen.

Q Do you remember back to when you were pregnant with Terry?

A Sure.

Q Did you drink alcohol when you were pregnant with Terry?

A Right.

[330] Q And what kind of alcohol did you drink?

A Bootleg liquor.

Q Bootleg liquor?

A Right.

Q Where did you get the bootleg that you drank?

A My husband, he was selling whiskey.

Q Who was selling whiskey?

A Noah, my husband.

Q Who is Noah?

A My husband.

Q So you always had a lot of bootleg around the house?

A At the time.

Q You did. And how often did you drink when you were pregnant with Terry?

A Oh, we started like on Friday night and drank up until Wednesday or something like that, and then Friday night we start back again.

Q Would you start in the morning or what time of day would you start drinking?

A Start at night and drink from the morning, too.

Q So you drank pretty much all the time during those days?

[331] A Right.

Q Did you know back then when you were pregnant with Terry that drinking alcohol would hurt your baby?

A No, I didn't. At the time I didn't hear anyone say anything about drinking, smoking carrying kids.

Q Were you ever arrested for selling bootleg?

A Right, yeah.

Q Okay, let's talk some more about when you were pregnant with Terry. Did you ever go to see a nurse or a doctor when you were pregnant?

A No, I haven't heard anybody say anything about going to see no doctors or nurses like it does now.

Q Do you remember when you gave birth to Terry?

A Sure, yeah.

Q Was he born in a hospital?

A Born at home at the house.

Q Was there a doctor there to help you?

A Nobody but midwife.

Q You had a midwife. How much did Terry weigh when he was born?

[332] A Four pounds.

Q Do you still drink, Mrs. Williams?

A No.

Q And how long have you been sober?

A Haven't drank anything since early part in the '70's.

Q I want to talk now about when Terry was a baby. Did he live with you when he was a baby?

A Right.

Q And he was with you for about a year?

A Right.

Q And then what happened?

A Then the police, Miss Allen, Noah called Miss Allen over there and told her – we called him Baby – O'Harold was sick or something. And she found out that he had gave him some whiskey.

And then the cops come there and arrested him and me and they taken the kids. But Callie said that if I hadn't been taking the whiskey on myself every time he come there, he wouldn't have took me.

That is what Miss Allen was telling me when I was in jail. Miss Allen was the matron down there. She said that.

Q So the kids were taken away because you [333] and Noah were drunk and because they were neglected; is that right?

A Say I was drunk, but I wasn't drunk. He was

Q When Terry was born, did you breast feed him?

A Right.

Q And how did he do nursing?

A He nursed some and feed him with the bottle some.

Q Did he nurse well or did he have a hard time?

A He had a little hard time.

Q Why did he have a hard time?

A I don't know. Then I give him his bottle.

Q Did he cry more than the other babies that you had?

A He did.

Q Did he go to school like he was supposed to when he was a little boy?

A He went sometime and played hooky and play around with the other kids.

Q What would happen when Noah found out he played hooky?

[334] A He whipped him with a belt, tie him to the bed and whip him real bad.

Q Let's talk about Terry's father Noah, now. What kind of father was Noah?

A He was, you know, beat the children real often, you know awful, tied them up against the bed.

Q Who did he tie to the bed?

A The boys, whip them with a belt, sometime with a switch, put them between his legs and whip them, you know.

Q Did he tie Terry to the bed?

A Sure.

Q What did the other kids do when Terry was getting beat?

A They would stay back in the other room, something like that. He would beat them too if they watch see what he was doing.

Q Did Noah ever beat you?

A We had fights a lot of time.

Q Did he ever hurt you when you were pregnant?

A Well he hurt me, you know, but I didn't do anything about it. He knocked me down the steps one time when I was pregnant.

Q He did what?

[335] A He knocked me down the steps one time. He run away. When he came back he said he thought he had killed me.

Q Was Terry scared of his father?

A Sure; all of them was scared of him.

Q Okay, let's talk about what is going on right now with Terry, the problem he is having now. Do you remember when Terry was in jail and was charged with murder?

A Sure.

Q And did his lawyer, Mr. Motley, call you?

A He called me, talked to me.

Q Did he come over to your house?

A No, ma'am, no.

Q Where did you meet him?

A Here in a room.

Q Here at the courthouse?

A Right.

Q Was it just the two of you meeting?

A No, I think it was one or two of the children, I think, but I don't know if it was O'Harold or Albert.

Q Was there another lawyer there?

A It was two of them.

[336] Q Two lawyers?

A Right.

Q Did you ever talk to Mr. Motley on the telephone?

A I guess it was Motley or the other one, one of the two.

Q You don't remember which one?

A No.

Q Did Mr. Motley tell you that he wanted you to testify in court at Terry's trial?

A Right.

Q Did he tell you what kind of questions he was going to ask you?

A All he said he wanted to ask some questions trying to save his life.

Q Did he discuss the questions with you?

A He discussed some, but he didn't – I don't think he discussed everything like he should have did.

Q Did Mr. Motley tell you that Mr. Fuller would be asking you questions?

A Unh-unh, he didn't tell me that.

Q Did Mr. Motley ever ask you if you drank alcohol while you were pregnant with Terry?

A No.

[337] Q Did Mr. Motley ever ask you anything about your pregnancy with Terry?

A No.

Q Did Mr. Motley ask you anything about when Terry was born or if he had any problems or anything?

A No.

Q Did Mr. Motley ever ask you anything about Terry's father Noah?

A No, I don't think he did.

Q Did he ever ask you anything about Terry's childhood at all?

A No.

Q Did Mr. Motley ever ask you if you thought there was something wrong with Terry?

A I don't know whether he did. He could have; I don't know.

Q Do you think he should have?

A Sure.

Q Did Mr. Motley tell you that he thought Terry had mental problems?

A No, but I told him that.

Q You did tell him that?

A Right.

MS. TARLOW: I have no further [338] questions.

CROSS EXAMINATION

BY MR. DANIEL:

Q Mrs. Williams, how long did you meet with Mr. Motley?

A He called me on the phone, then when I met him it was down here. I don't know how long it was. It was in a room back there.

Q Well, do you have any recollection? Was it two minutes or an hour?

A Well it was longer than two minutes.

Q It was?

A Right.

Q Did he cut you off or did you have a chance to tell him whatever you wanted to tell him?

A No, he didn't cut me off.

Q Did you have a chance to tell him whatever you wanted to tell him about Terry?

A Whatever he asked me, I told him.

Q Did he ask you any general questions about – like is there anything that you can think of that might help Terry?

A Yeah, he asked me that.

Q Did you have a chance to answer those?

A Sure.

[339] Q What did you tell him?

A I don't know now what I told him.

Q So you don't remember what you told him?

A No.

Q Is it possible he asked you some questions that you don't remember now, since it was ten years ago?

A Well if I could hear it, maybe I would know.

Q And you testified at trial; right?

A Right.

Q You testified that he was a nice boy; right?

A Yeah.

Q So you just remember the two times you had any contact with his lawyer, the once on the phone and once in the office down here, once in the room down here?

A I think he called the house more than one time.

Q Oh, he did?

A Uh-huh.

Q How many times did you speak with him?

A Whenever he called.

Q How many times did you speak with him on [340] the phone?

A I don't know.

Q Mrs. Williams, what is Terry's birthday?

A September 13.

Q Of what year?

A '55.

Q Excuse me?

A '55. When they went to school, I give them all their ages and told them to keep their ages.

Q When did you start into your heavy drinking, approximately when?

A Heavy drinking, it was before he was born.

Q But I mean when?

A In the '50's; it was in the '50's.

Q So it could have been '54 and could have been '50?

A '54 something like that. It was early, you know. It was in the '50's way before he was born.

Q How old were you then?

A I can't say exactly how old I was. I am 70 years old, and when he was born – I can't remember how old I was.

MR. DANIEL: No further questions,

* * *

[TESTIMONY OF NOAH WILLIAMS, JR.]

[342] A No. I was working, but my daughter has a fatal disease that she needs twenty-four hour care, so I am basically taking care of her until I find a place to live and have nurses take care of her for me.

Q Do you remember your childhood?

A Yeah, I remember it like it was yesterday, brings back a lot of good memories.

Q Do you remember the daily routine that your father had the kids do at home?

A Yeah, very well, sort of blurs in your mind a lot. When you get out of school, the first thing you do is do homework. If you didn't have homework – but most time you did.

After homework you did chores, and after chores if Daddy wanted you in the garden, then you go in the garden. And that is where you spent most of your day, in

the garden, because my father loved the garden, and that is one of the jobs you had to do.

Q What happened if you didn't stick to the schedule?

A Well, hopefully my dad, hopefully he would try to forget a beating. But ninety-nine percent of time, if you didn't do what he tell you to [343] do, you were subject to get a nice good beating from my father.

Q Can you describe for me, Noah, how your father beat you?

A Well he had two ways of beating you. One way was that he would have you to bend over and put your head between his legs, so the only thing he saw was your rear end. That is basically what he wanted, and he would whale away.

The second way that he would punish us was that he would get a belt. And well first of all he would tell you if you knew you were going to get a beating, he would tell you to go in the room and strip or take your clothes off.

And my dad, he was not the kind of person that wanted underwear on or a tee shirt, he wanted you buck naked so he could have his little good beating.

And when he beat you, he beat. He would raise whelps, and sometimes in his anger he wouldn't particularly care what he swung at. He would try to catch you from the waist down, but sometimes if you are trying to dodge, you might get a belt across the face or something. So he was out for punishment.

[344] Q Can you tell me about your parents' drinking? Did your father drink?

A Yes, he was a very heavy drinker. What he would do, and he would let's say for instance for Thanksgiving he would start drinking on Thanksgiving, and it would continue until after New Year's.

Q Did your mother drink?

A Mom didn't too particularly care to drink. My father would tell her come on take a drink, come on take a drink.

My mom didn't want to be sober – well, she wanted to be sober, but my dad would tell her come on take a drink, come on take a drink. I guess he would feel better knowing that my mom was drinking right alongside him.

Q What did you kids do when your parents were drunk?

A Well that was basically the only time we had a break. Because if things needed to be done around the house, we sort of overlooked it, and that was our break.

And sometimes we would say while mom and dad drunk, we can have a good time until they sobered up to where they realized what was supposed to be done wasn't being done.

[345] Q Did your parents ever fight?

A They fought constantly. We was too small at the time to try to stop it. My dad would really get into a good hard fist fight with my mom.

And my mom wasn't that big; she would try to fight him off. What we had to do, my brother, O'Harold, he was next to the oldest. What we had to do was go run and find him in order to come back home to try to break up the fight.

A lot of times when he was there, the fight was – they had already calmed down a little bit. And he would look around, be there for a couple of a minutes.

I, along with my other brothers and sisters were sort of scared, and we wished that O'Harold would stay there because we knew that once he had left, they would start right back at it again.

Q What would Terry do while they were fighting?

A A lot of times Terry wasn't home a lot, but the times he was home, he would sort of huddle up in the corner shaking, crying.

Where we live, most of the time Mom and Dad, they would sleep in the living room. And that was basically the family room, that is where [346] everybody would get together to watch TV and stuff like that.

And there is a little corner in the room where either I would stay because I was sad or he would stay or whoever got this corner first would be there.

Q Can you describe what Terry was like as a child for me, what your memory is of him?

A Well, he was a spicy, energetic young boy. One of the problems that he had was that he ran with the wrong crowd, for one thing.

And I was spicy, I used to run around with the wrong crowd, I used to do that for attention, but I have learned my lesson, so I don't mess with that no more.

But Terry would always be around the wrong people. He was very, very, he could be influenced very easily, very easily influenced.

Q Was he a good student in school?

A Not really. He always, he hardly ever go to-school. That was one of the requirements that my dad was very strict about, that you needed an education.

And he would know whether my brother Terry would be in school or not because the [347] teacher would call or bring a note home. If he wasn't at school, then I would get a note and bring it home to Mom or Dad. Chances are probably give it to Mom.

Q Then what would happen?

A Well if Terry came home that night, he would have gotten a beating. But a lot of times he wouldn't come home at night, and that was to avoid getting beat.

Q So he knew if he didn't go to school, he was going to get a beating?

A He knew that if he didn't go to school, he knew if he didn't do his work he was going to get a beating. There was a lot of things that Terry knew he should have done, but for some reason he just didn't – he didn't do like we did.

We knew that when we came home from school, we had chores to do. Well for some reason he just didn't – it

just didn't get in his head right for some reason. He just didn't, for some reason he just defied anything Dad would tell him.

Q What would Terry do to avoid getting a beating?

A Well, let's see, he would, Number 1, stay out all night long. My Dad would tell me or my [348] brother to go find him.

Well a few times we did find him, but see we knew what was going to happen. We knew he was going to get a severe beating. And so a lot of times he would say please, please, I mean he would beg and he would cry and he would plead with me and my brothers not to take him home.

I felt sorry for him, my brother felt sorry for him, we would both look at each other and say, what should we do? We will just tell Dad we couldn't find him.

Q Can you tell me about the time Terry fell off the roof? How old was he then?

A I think he was somewhere between maybe 10 and 7, somewhere between the ages of 8 and 12, somewhere along there.

Q Were you there?

A Yeah, I was there. What it was is that there was called Grasty school, we used to play baseball there.

And some of the guys used to get on the school building just to have an overview of the playing field. And what we would do was sit on the edge of the brick wall.

And what we do is lean back and [349] catch ourselves before we fall. Well I guess Terry was trying to do the same thing, and he was doing this. And all of a sudden, for some reason his fingers slipped and he fell back and head first on the concrete pavement.

Q And what happened?

A He had passed out, and I am not too – I am not too familiar exactly what happened after that. But I know for a fact that – let me try to say this – if any of the other of us got into any trouble, for some reason if anything on the outside, like the police came by for some reason, my Dad wanted to find out why. And if it was one of us, pheww, it was a nightmare.

Q When Terry fell off the roof, how high up was the roof?

A I would say anywhere between ten and twelve feet. It was a high roof. You just couldn't jump up there, you had to climb a gutter in order to get up on that section of the roof, and it was a small Section of the roof.

Q And he fell off backward and landed on the back of his head?

A Yes. That is where he got his nickname chick from, because he had a little bump back there. [350] It was a chicken egg, so that is where he got his nickname Chick from.

Q Okay, let's talk about the trial. You were in the Army during Terry's trial?

A Yes.

Q Did Mr. Motley or Mr. Smitherman ever try and contact you?

A To be honest with you, I am not really sure. When I was in the service, I was in the 57th Battalion we went a lot of places. A lot of times I was not allowed to tell my family where I was at because of security reasons.

So to be honest with you, I am not sure. I know I heard something about the trial, but it wasn't as clear because a lot of things was going on in my life at that particular time, military-wise and family-wise.

Q If they had called you, would you have gotten emergency leave and come home?

A Absolutely. That is one of the things that my captain and platoon sergeant try to stress is that any time there is an emergency in the family, what they like to do is try to get you out of the military situation so that you can take care of whatever family emergency arises so it will not [351] affect your job performance.

MS. TARLOW: Thank you, Noah, I don't have any more questions.

CROSS EXAMINATION

BY MR. CONDON:

Q Mr. Williams, you were stationed at Fort Bragg?

A Yes, sir.

Q 82nd Airborne?

A Yes, sir, the 53rd Battalion.

Q My daddy was in the 82nd a few years before you. Have you ever been diagnosed as having fetal alcohol syndrome?

A No, sir.

Q You were born about a year before Terry?

A A year and a couple of months.

Q Did you have a lot of, when you were in the service, did you have physicals?

A After the service?

Q No, in the service?

A Yes, if you needed one. I mean, you go get certain blood tests and stuff like that.

Q And you knew about the trial but didn't come to it?

A See, what it was, I was calling my mom [352] or writing letters more or less, and it was sort of bits and pieces, because I couldn't get too much information at the time. I try to keep up with what is going on because it is my home town, so I try to keep up.

Q Fort Bragg is not that far away?

A Well it is about a three-hour drive.

Q And you said your daddy was a hard worker?

A Yes, he worked hard.

Q He had a job?

A He was working in the mill.

Q Did he work –

A I am sorry, tobacco company. He was a janitor at Westmoreland High School.

Q Did he work two jobs?

A Actually three jobs.

Q So he worked hard to support his family?

A Yes, sir.

Q And then he would come home and make you all do the chores around the house?

A Yes, sir.

Q Let me ask you this, have you ever been convicted of anything?

A No, sir.

[353] Q And you grew up under the same conditions and in the same household as Terry?

A Yes.

Q How about Larry, has he ever been convicted of anything?

A No, sir.

Q He grew up in the same household?

A Yes, sir.

Q How about Jerry, has he ever been convicted of anything?

A He has been in any little trouble, not anything big.

Q He grew up in the same household. How about Olivia, has she ever been convicted of anything?

A No, sir.

Q She grew up in the same household?

A True.

Q And the same questions for Odessa and Laverne?

A Odessa was sort of on – I wouldn't exactly say she was on the wild side. She was a little unsettled.

Q Has she ever been convicted of murder or grand larceny?

[354] A No.

Q She grew up in the same household?

A Oh, yes.

Q How about Laverne, has she ever been convicted of anything?

A No.

Q And she grew up in the same household?

A Yes.

Q Same parents, same conditions?

A Same.

MR. CONDON: I don't have any further questions.

Q Oh, one other. You did have an honorable discharge?

A Yes, sir.

MR. CONDON: Thank you.

THE COURT: You may step down.

* * *

[Testimony of Dr. Robert Brown]

[358] Q What is your experience what is the level of your experience in treating patients for depression?

A Most of the patients I treat are depressed.

Q And over the years since 1971 that you have been a psychiatrist, how many patients would you say that you have treated for depression?

A Hundreds if not thousands.

Q Do you have experience treating lawyers for depression?

A Yes, I have.

Q Has that been an ongoing part of your practice?

A Yes, it has.

Q And is part of your practice right now?

A Yes, it is.

Q I think that you just stated that in your responsibilities with the Social Security [359] Administration, you review records and render opinions. Is that common in your profession, the reviewing medical records in the process of arriving at opinions?

A Yes, it is.

Q Why is that the case?

A Well it has to do with disability claims based on emotional problems. That is principally what I do it for the Social Security Administration.

Q When you treat patients, is there occasion when that patient has already been treated by other doctors?

A Yes.

Q And would part of your regular practice be gathering those records and reviewing the records of prior treatment by doctors?

A Yes.

Q In preparation for this trial, did you review Mr. Motley's deposition taken in January 1995?

A Yes, I did.

Q Did you also review the medical records of Mr. Motley from June 1987 through the early 1990's?

A Yes, I did.

Q Did that include the records of Dr. [360] Gaddy, an internist, from June 1987; and Dr. Fletcher, a psychologist in '87 and '88; and Dr. Hartman in 1987 at Lewis-Gale Psychiatric Center; and Dr. Ashby, a psychiatrist from Danville from '88 through '90; and then finally Dr. Beshara and Jane Shield in Richmond during the period 1990 forward?

A Yes, I reviewed those records.

Q Do these records reveal that a diagnosis had been reached regarding Mr. Motley?

A Yes, sir.

Q And what was the diagnosis?

A There were several diagnoses given. The first was major affective disorder. He was also diagnosed as having a dysthymic disorder, which is a chronic, less severe form of depression.

Dr. Beshara diagnosed an anxiety disorder not otherwise specified. Dr. Shield diagnosed recurrent major depression as well as dysthymia.

Q What are the symptoms of major affective disorder?

A To have a diagnosis of major affective disorder, you must have a depressed mood or a serious loss of interest in many things. Also there is usually problems associated with sleep, appetite, [361] energy level, interests, maybe preoccupation with death, perhaps irritability, difficulty concentrating, slowed thinking.

Depression has often been compared to a hibernating bear, someone who just goes into a room and isolates themselves.

Q Did those medical records indicate that from the period 1987 through the period of time in which he was treated in Richmond, as well, that Mr. Motley received treatment? In other words, what was the type of treatment that the doctors gave Mr. Motley?

A He was treated both with medication and psychotherapy.

Q Is it common during the course of treatment or is it a regular practice in the psychiatric profession to

inquire of the patient concerning how long the depression has lasted?

A Yes, it is important to take a history.

Q And is this something that doctors would make notations and records concerning the longevity of the illness?

A Yes.

Q Why is this important?

A It is important to make the diagnosis as [362] accurately as possible and to tailor the treatment to the diagnosis.

Some forms of depression come and go, some stay at a fairly low grade level, some are associated with the opposite, a very high mood, so it is very important to get a baseline level of the mood level and psychological functioning in general.

Q Did the doctors' records that you reviewed, did they indicate the longevity of the illness that Mr. Motley suffered from?

A Yes, they did.

Q Was that according to the statements made to the various doctors by Mr. Motley?

A Yes.

Q What did the records indicate?

A The records indicated he had been depressed for as recent as six months and for as long as he was a senior in college.

They were described as problems with depression, bouts of depression, recurrent depression. I think that is about it.

Q And according to the medical records that you reviewed, did those records concur that Mr. Motley stated that he was suffering from depression during the period 1986 and 1987?

[363] A There was no specific statement that he made in those records that he was suffering specifically during that particular period of time, but that is a time that is inclusive within the periods that were described by him through I think four different psychiatrists.

Q So that for instance when he spoke to Dr. Fletcher in September of 1987, that he told Dr. Fletcher that he had been depressed for two years, that would include '86 and '87?

A Yes. As I said, I think he told Dr. Fletcher that he first became depressed as a senior in college and had been dealing with depression off and on since that time.

Q Is it unusual for a patient suffering from depression to delay seeking treatment, his initial treatment?

A It is very common. One of the problems is that it is such an illness, sometimes the patient is the last one to know what he has.

Sometimes they are relieved to be told that they have depression, because it tends to get primarily into their sense of themselves, their self-esteem.

It is one of the few diseases as [364] which one describes himself as depressed. one may say I am

depressed after they find the diagnosis. It is not like I had a heart attack, I had pneumonia, I had a broken leg, I had a stroke. It is my very nature, I am depressed.

Q Did you also have the opportunity to review records from the Virginia State Bar relating to discipline of Mr. Motley during the period of 1986 and 1987?

A Yes, I reviewed disciplinary records covering the period beginning in 1982 and going through I think 1987.

Q And did you review both the reference to the private reprimand issued in November, 1986 and then the public reprimand issued later, and then the suspension of his license to practice law for a hundred twenty days?

A Yes, I did.

Q Did this discipline indicate the type of misconduct which led to the disciplinary penalties?

A Yes, it did.

Q What type of misconduct was cited by these records?

A The inability to meet deadlines, to keep minimally acceptable accurate records, to settle a [365] marital dispute in a timely manner with regard to settlement of property. It had to deal with things that are mostly associated with symptoms of depression.

Q And that would include inability to concentrate on details and procrastination?

A Yes.

Q Were you present at the courtroom yesterday when Mr. Motley testified?

A Yes, I was.

Q Were you present when he testified that in retrospect his depression was linked to the misconduct which resulted in the bar discipline?

A Yes.

Q Were you also present when Mr. Motley described his failure to obtain records regarding the Terry Williams case from the Department of Corrections and Youth and Social Services and medical records, school records and other documents relating to his representation of Terry Williams?

A Yes.

Q Were you also present when Mr. Motley testified that he never went to Henry Street to interview the family or neighbors?

A Yes.

[366] Q Now in your experience as a forensic psychiatrist, is that unusual for attorneys that you have worked with in serious felony cases?

A It is very unusual.

Q Why is that?

A Because in capital cases it is extremely important especially to have all the background records in order to follow any leads, both for penalty as well as for sentencing.

Q And is that conduct also consistent with the pattern of procrastination and failure to attend to details that you have already testified to?

A Yes.

* * *

[368] Q Dr. Brown, based on your review of Mr. Motley's medical records, his deposition, your review of his discipline by the Virginia State Bar, your observation and evaluation of his testimony yesterday, have you been able to reach an opinion to a degree of medical certainty concerning whether Mr. Motley was suffering from depression from July 1986 through September 1987?

A Yes, I have.

Q What is your opinion?

A My opinion is that he was suffering from depression during that time.

Q Mr. Brown, I want to go back. Have you [369] been involved – how many cases have you been involved in involving serious felonies up to and including capital murder cases?

A I have been doing this kind of work since 1971. I don't have an actual number. I have done many forensic psychiatric evaluations mostly for the defense in serious criminal cases, including capital murder cases.

Q Have you been appointed as an Ake, A K E, Ake expert in cases?

A Yes, I have.

Q What is the role of a court appointed Ake psychiatric expert?

A I think it is to render an opinion regarding mitigation and mental status at the time of the offense as well as to assist the defense team both at the penalty and sentencing phase.

Q Does that include also, does that encompass trial preparation?

A Yes, it does.

Q In your experience since 1971, what has the role of attorneys been as far as gathering information, identifying witnesses and obtaining records for the forensic psychiatrist to review?

A I have usually been provided with fairly [370] good background information. I often have to ask for more information, as well, and cooperate with them and spend a fair amount of time with these people.

Q And why is it necessary for the attorney to provide background, as you said, background facts?

A I don't think it is possible to arrive at a reasonable, valid, accurate psychiatric diagnosis without background records and information.

Q And what type of background records and information would a forensic psychiatrist look for or want, to be able to render a reliable evaluation?

A You want to have medical records, academic records, criminal records, military records if they exist, employment records, have an opportunity to talk to significant people in the defendant's life, especially family members or relatives or employers, teachers, people who knew this person well.

Q Would that also include records from youth and juvenile services, things of that nature?

A Yes.

Q And also correctional records to see how the defendant has adapted to the prison environment?

A Yes.

Q Now for instance when you were asked to [371] assist in the state habeas proceedings with Terry Williams, did you seek the records that we have just discussed?

A Yes, I did.

Q And did you also personally interview important people in Terry's family and background?

A Yes, I did.

Q For instance, did you interview Lula Williams?

A Yes, I did.

Q Is that Terry's mother?

A Yes, it is.

Q And what did you find out when you interviewed Lula Williams?

A I interviewed her here in Danville in July 1989. She told me that she did not see a doctor while she was pregnant with Terry Williams, that he was born at home, that he was the smallest of her children, most of whom were small, he weighed four pounds.

He was delivered by a midwife, he was very slow learning to walk and talk. She admitted that she drank heavily during her pregnancy with him.

Q Did those facts, did you keep any [372] written records of your interview? Is that your practice?

A Yes, it is.

Q Did you have an occasion to review your interview notes with Lula Williams in 1989?

A Yes, I did.

Q After those facts that you just recounted about her drinking when Terry was in utero and his low birth rate and the other characteristics you just described, did you make any notations in your records after she described that?

A Yes. I wrote fetal alcohol syndrome right after her name after about the fourth line of talking with her about this. Also make audio tape recordings of all my interviews with Mrs. Williams and other members of his family.

Q And would the fact that when you had noted fetal alcohol syndrome, did you feel that that warranted a closer look as far as tests with Mr. Williams?

A I was more impressed frankly with the history of multiple injuries of his head. And I thought that he needed neuropsychological testing and a scan of his brain, either a CT scan or an MRI.

Q And are there particular doctors who – I [373] am not going to ask much about fetal alcohol syndrome because we are going to get to that this afternoon, but is that something that a psychiatrist normally deals with or are there specialists who deal with that syndrome?

A I think psychiatrists are expected to make the diagnosis or raise the question of a diagnosis and note it and then refer them to a specialist in the field, either

geneticists, dysmorphologists or others who deal with this.

Q Now you stated that you have worked with attorneys in serious capital cases, including capital murder cases, as a forensic psychiatrist?

A Yes, I have.

Q And you also have extensive experience treating attorneys for depression?

A Extensive, I am not sure that I said that. I have one law student and two attorneys right now as patients currently, and I have been treating university community members since 1971 so . . .

Q Would you say that from 1971 to the present that you have throughout that entire period been treating lawyers, for instance?

A Yes.

Q Now a lawyer who was suffering from [374] major affect disorder, severe depression, who was not being treated by psychotherapy or with medication, do you have an opinion on whether a depressed lawyer, a lawyer depressed to that magnitude, do you have an opinion to a degree of medical certainty whether such a lawyer could effectively attend to the [sic] all the detailed work associated with representation of a client accused of capital murder?

A It would be very difficult for a depressed attorney to meet the requirements of practice, especially in capital cases.

Q Is that your opinion?

A Yes, it is.

Q And in reviewing the various materials that you have been reviewed in connection with this case and listening to the testimony of Mr. Motley, is it your opinion that his depression affected his performance in this case?

A Yes.

* * *

[385] Q I think that when you described the symptoms, that part of the symptoms or several of the symptoms was procrastination, inattention to detail, inability to concentrate; is that right?

A I didn't use the word procrastination. I said slowed down photurically and cognitively. I certainly said trouble concentrating.

Q Again there was a focus during the cross on the medical records, but weren't those symptoms fully consistent with the conduct which led to the discipline with Virginia State Bar?

A Yes.

Q And the inability to keep records or to meet deadlines and things of that sort?

A Yes.

[386] Q And in your treatment of depressed patients, is that typical of depressed patients' characteristics?

A Yes, it is. It is very, very hard for them to keep up.

MR. POWERS: I have no further questions.

THE COURT: I didn't hear the last answer.

THE WITNESS: It is very, very hard for them to keep up with the requirements of life.

* * *

[TESTIMONY OF DR. THOMAS L. PINCKERT]

[407] Q And I would like now to talk about Terry Williams. You reviewed a series of records in preparing to examine Mr. Williams and preparing your report; isn't that right?

A That is correct.

Q And I believe you listed these records in your report?

A Yes, I did; fairly long list.

Q Yes, it is. Did you perform a physical [408] examination of Mr. Williams?

A Yes. I traveled to Mecklenburg Correctional Center on the 10th of June of this year 1995 to examine Mr. Williams in the penitentiary.

Q And what was your diagnosis?

A My diagnosis based upon Mr. Williams' physical findings was that of an individual who suffered from fetal alcohol syndrome.

Q Do you know whether there was a history of Mrs. Williams consuming alcohol during her pregnancy with Terry?

A The affidavit that was included in the records that I reviewed indicated from Mrs. Williams, testimony

that she drank very heavily during her pregnancy, often five days a week drinking virtually all day long as she described it, occasionally having one or two off, and sometimes drinking seven days a week.

Q How does this amount of alcohol rate in terms of toxicity to a fetus?

A Oh, it is terribly toxic to a fetus.

Q Did you also review court records of Mrs. Williams' conviction for bootlegging?

A Yes, I did.

* * *

[411] That is, it causes these organs that are exposed to that to not form correctly. Alcohol exposure in the second trimester predominantly causes miscarriage.

If the mother drinks very, very high levels at that point, oftentimes there are miscarriages that occur with that.

And I believe in Mrs. Williams' record, it is indicated that although she had twelve pregnancies with living outcomes, she also had 3 miscarriages, which would be fully consistent with someone who was drinking.

And then lastly, someone who continues to drink in the third trimester of pregnancy, the alcohol acts differently, and it causes the growth retardation we were describing.

* * *

[421] Q Dr. Pinckert, I would like now to get back to Terry. And if we can point out the facial features on

Terry's face, that would be more accurate than the drawing.

A Sure.

Q And we are going to videotape this so that Judge Ingram can watch it on the screen.

(VIDEOTAPE SHOULD BE VIEWED ALONG WITH THIS TESTIMONY.)

Q You were going to show us some facial features on Terry's face which led you to diagnose him as having fetal alcoholic syndrome.

A Mr. Williams, are you okay? I am sure [422] you are. I am going to ask you if you wouldn't mind to just hold your face as still as possible and keep your face as level as you can, chin down just a tad bit.

All right, what I would like to point out in looking at Mr. Williams' face here is that he has some facial asymmetry right here. This portion of his face is flatter than this portion.

And if you will look, his left eye opening is smaller than his right eye opening. And his left eye is slanted slightly upward. In other words, it doesn't sit like that, it sits more like that. That is very, very common.

He has, if you will notice, this eye looks like it is a little bit puffy, but in reality what he has, he has some drooping, what we call ptosis of this lower lid.

The same thing is true for his left upper lid. If you look, there is less of his iris that is visible on his left eye than in his right eye because the lid comes down a little bit further.

I won't redo the measurements, but I will tell you that the size of his eye openings is far smaller than two standard deviations, which [423] would put it somewhere around the third percentile for eye opening size.

In addition, if you look at the space between what we call inner canthi, that is the inner portion of his eye, to the inner portion of his eye, that is well larger than ninety-seven to ninety-eight percentile for adult males.

And the same is true for his interpupillary distance, that the distance between the pupils is widened because the eyes are shifted somewhat laterally.

In addition, as you can see, Mr. Williams has a fairly full upper lip like I described for you that is common in many African-Americans, but if you notice the area of his filtrum is fairly long.

And anybody could come over and see, there is very little distinction such as many of you might look in the mirror or whatever yourself and look at someone around you, Mr. Williams' lip is very, very smooth.

His whole face is somewhat asymmetric because there is some flattening over here. If you look, his eyes are somewhat slanted, his whole face, his jaw and everything is slightly asymmetrical up this way.

[424] The jaw feels like it is normal in its size, but it is just shifted upward because of that.

Now, Mr. Williams, could you open your mouth for us please, real wide. And I think it would be easy to show you that he has bad teeth. I think that is the best way to describe it.

He has teeth missing and he has got a space between his teeth. And in fact Mr. Williams wears a partial because his central incisor on the left side is gone.

And when he takes his partial out, you can see the teeth are quite malaligned, they are twisted almost like peg type teeth, as well as the enamel is very, very poor on the teeth. And that is something we see in and above poor dentition or brushing or anything of that particular nature.

Mr. Williams, would you hold your hands straight out for me, please. If you look at his hands, he has got a fine motor tremor. it is more easily seen if you put like a piece of newspaper or a sheet of paper on there. But it is like this, it trembles.

In addition, he has these somewhat what we call hyperconvex, spoon-shaped sorts [425] of nails and very slender little fingers. Now could you try and roll your arms outward for me, palms up?

And you see, he is able to rotate this one flatter than this one. This is as far as he can get. And that is the radial ulnar synostosis that we – we are all doing it here now – but most people can rotate their thumbs or their wrists completely around; he cannot.

And that is very, very characteristic of somebody who has been somewhat restricted in utero due to alcohol exposure, not able to move those. And when those joints form, they don't form as fully as they would in somebody not exposed to that. And so, therefore, he is stiff, he can't move those out.

I think that is probably as much as I can show you right now. Thank you, Mr. Williams; appreciate it.

Q Dr. Pinckert, there were a few facial characteristics on the chart and that we have seen in your slides that Terry does not exhibit.

You have already explained to us about the thin upper lip being something that wouldn't be obvious in an African-American. How about the low nasal bridge, is that something that –

[426] A Again, I think if you measure Terry's nose, Mr. Williams' nose, from the root to the tip, his nose is somewhat shorter than average.

But of course there is natural variation and again there is some racial differences, as well, because many African-Americans tend to have a fairly flat, broad nose anyway.

Q Does that particular facial characteristic change with age?

A It does tend to modify. The nose tends to grow, the jaw tends to grow, as I described. So features that are more prominent at an early age tend to become less so as the individual matures.

Q I would like to talk about growth deficiency now. You reviewed records from the Virginia Department of Youth and Family Services. Did you note anything in those records documenting Mr. Williams' growth?

A May I refer to my report?

Q Sure.

A Yes, I had a large volume of essentially youth records to refer back to. And as I said, I have a birth record or a birth certificate from Mrs. Williams.

There was no birth weight listed [427] on it, and the birth weight of four pounds was as indicated in her affidavit. As I mentioned before, that is far, far below the third percentile. Actually it is more like what you would expect to see in an average thirty-two or thirty-three week gestation, so much smaller than you would anticipate.

I found on 11/67 that Mr. Williams was fifty-five inches tall and sixty-eight pounds. That height is equivalent to eighth percentile and weight was less than fifth percentile.

Again on 3/71 there were additional court records that indicated he was found to be sixty-three inches tall, that is the twelfth percentile, and a hundred ten pounds, which was the eighth percentile.

At the time of my examination, Mr. Williams was found to be at the twenty-fifth percentile for height and the fortieth percentile for weight.

Q Thank you. Could you just briefly recount for us the actual physical defects to the brain and what organic brain damage is, how the brain is damaged by alcohol, and just physically how the brain is damaged and how the connections are not working?

[428] A As I mentioned before, when there is severe alcohol exposure to the developing brain, there is cavitation of the ventricles. The ventricles normally have spinal

fluid in them, and they are normally like small slits, as you saw on the previous slides.

When these infants' brains are forming, those connections do not get together and you have large spaces, large empty holes where normal brain tissue should have formed that is not there.

As I indicated also a very important aspect of the brain halves is that they communicate back and forth through something that we call the corpus callosum.

That is frequently absent as described in that slide that I showed you, and it is a very common finding in infants born with fetal alcohol syndrome.

In addition, there appears to be damage to the frontal lobe which essentially controls our conscience and our ability to make informed decisions and understand, in other words.

Q Did you see any other physical symptoms in Terry that led to your diagnosis that you haven't pointed out yet but that you did include in your [429] report?

A Yes. In addition to the things that I noted, he has the facial features that I described and in his mouth, he also has upper thoracic scoliosis, which is a common finding.

In other words, when he bends forward, if you look at his spine, his spine does not just bend forward, it curves. And so that is probably due to abnormal ligament texture.

And again we think these babies are somewhat fixed in utero, and so that doesn't form in a nice straight line

like most of us have. And so they get these bulges, and so they frequently have back problems associated with that.

I did not hear a heart murmur on Mr. Williams but again that is not found, or a heart lesion is not found in every case. And an auscultation or listening to the heart is not as accurate as more accurate sonogram that might tell more subtle distance.

I also found that Mr. Williams had difficulty when we did a brief neurological examination with balance and with we call rapid alternating movements.

We do rapid alternating movements [430] where we have them move their hands back and forth or put their fingers together or like the type of testing that you do for sobriety where you have them tip their head back, shut their eyes, and put their finger to their nose.

Mr. Williams had a great deal of difficulty with that. When I asked him to stand on one foot, he practically could not do it when he was standing on his right foot, his balance was so poor.

He was able to do it a little bit better on his left. And that goes along with cerebella damage, as well. And when I asked him to do the sort of can you walk the straight line, that is what we call a heel-toe walk where you put one toe right behind the heel of the other and keep going, Mr. Williams was unable to do this. So he clearly has neurological deficits, as well.

Q I would like to talk now briefly about what the knowledge of these sorts of physical problems would have been in 1986. The examination that you did on Terry on June 10, were doctors knowledgeable enough to do

that sort of examination in 1986 or is this a new thing that has recently developed?

A No, Mrs. Tarlow, it is clearly not a new [431] thing. As I mentioned I think briefly in my discussion, there were about two hundred articles in '79, and by 1985, the time that Mr. Williams was in the penal system, there were more than two thousand articles in things such as the Lancet, in the JAMA, the Journal of the American Medical Association, New England Journal of Medicine, a variety of very well-known, notable medical journals published a great deal on these sorts of things.

In fact, in 1981 the Surgeon General issued a warning to pregnant women stating that pregnant women should not drink alcohol while pregnant or while attempting to become pregnant. So clearly there was a body of literature that was available to the practitioners.

I think that as I said it is imperative that someone who would make this diagnosis would be aware of the diagnosis, that they would be trained as a geneticist to make these subtle, dysmorphic or dysmorphological findings that we made.

And in addition I think it would be important – you can make the diagnosis without a knowledge of maternal alcohol exposure, but certainly if that was known that would have, along with Mr. Williams' short stature and his long documented [432] history of school problems as far as learning disabilities and infractions with the law as well as behavior problems, I think clearly somebody should have tumbled to this in 1985 and '86.

Q That was my next question, actually. if his symptoms are so obvious and he was in a psychiatric hospital being evaluated by forensic psychiatrists and psychologists, why didn't these people ever catch this and diagnose him?

A Well probably for the reason that geneticists feel that geneticists should be doing these evaluations. Psychiatrists are not adequately trained to make these types of diagnoses no more than they would be trained to do heart surgery.

Q What kind of information would have flagged to the psychiatrist at Central State Hospital that they should be looking further?

A Well I think a variety of things. One, Mr. Williams' small stature; two, his longstanding behavioral problems. And by behavioral problems, I mean things as far as school records, learning disabilities, and his multiple infractions with the law.

Q Would a history of maternal drinking have been a factor?

[433] A Clearly that would have been a factor, but my personal bias as a geneticist is that any male who is found to be learning disabled with these sorts of things, that that diagnosis should be considered as part of the general workup of why his mental retardation or learning disability is present.

Q And you teach at Georgetown Medical School; isn't that correct?

A That is correct.

Q And you teach doctors about fetal alcohol syndrome?

A That is correct.

Q And when you prepare your students to practice, do you hope that they will be able to diagnose this syndrome or do you instruct them to seek the assistance of a geneticist or dysmorphologist to make the diagnosis?

Do you give them enough to expect that they will see some warning signs and call someone else in to make a diagnosis or do you think that they are qualified to diagnose on their own?

A I would like to think I didn't do my fellowship for no reason. But, no, I hope that when I am through with my students and my residents that they are capable of knowing this is an entity that [434] exists out there and that when there is a history of maternal alcohol abuse, that they would refer the patient on to the appropriate expert who can make the diagnosis and do the appropriate testing, triaging, and also establish the appropriate management and care guidelines for someone. None of my students who are residents are capable of doing that.

* * *

[CROSS EXAMINATION]

[454] We have had testimony from two forensic psychiatrists, one of whom was board certified who essentially said – and they examined Mr. Williams back in '86 – and they have essentially ruled out FAS. I don't know if you knew that or if you care to comment on that.

A I would be glad to comment on that.

Q All right.

A I don't think a clinical psychiatrist is qualified to make a diagnosis of fetal alcohol syndrome.

Q Psychiatrist?

A Psychiatrist, period.

Q Forensic?

A I don't care if they are – I don't believe that a clinical forensic psychiatrist is qualified to make the diagnosis of fetal alcohol syndrome unless they have received formal training in genetics and dysmorphology. They can certainly comment if they wish regarding learning disabilities or behaviors, but I think you are taking one aspect of the three out of context as saying, because they believe this, he doesn't have anything that would relate thereto.

And I think that is unfortunate [455] and also inaccurate. I don't believe that that is a qualified way to do it, personally. And as I tell my residents in medical school, if you don't look for it, your are never going to find it.

So if in 1986 they were as we say knowledge deficient in fetal alcohol syndrome, then it wouldn't surprise me whatsoever that they wouldn't make a diagnosis of a disease they didn't understand or had no knowledge of.

Q But if they found no neurologic abnormalities, which is one of the three categories of characteristics, why go any further?

A How can you say that Mr. Williams who has an IQ of 69 to 80 or whatever not having neurological findings when he has multiple psychiatric and psychologic

examinations saying that he has got a variety of issues. I am not sure what you are driving at.

Q I didn't say it. I thought the doctors, the psychiatrists did yesterday. You earlier on in your testimony, I thought you intimated somewhat that maybe there is what you would call a turf war between various specialties, and I assume that you consider that you with your knowledge are the best qualified to diagnose this?

[456] A Well I think that that is why we have an American College of Medical Genetics and why people become board certified in medical genetics so they can make diagnoses of genetic diseases and birth defects.

And I think the training is quite different to become a forensic or a clinical psychiatrist, although they are MDs. And I think that because of that I would agree with you that I believe that most psychiatrists do not have the proper background to make the diagnosis.

Q And again we don't know if there was anyone qualified in 1986, with your qualifications?

A I wouldn't know, sir.

MR. CONDON: Thank you, Doctor.

REDIRECT EXAMINATION

BY MS. TARLOW:

Q I just have a few things, Your Honor. Dr. Pinckert, when you make your diagnosis, if you are missing one factor or if you have a lower demonstration of certain other factors, how do you make your diagnosis?

Do you consider every single possible symptom that a person could have with fetal alcohol syndrome or do you look for a certain number [457] of things?

A No one individual fetal alcohol syndrome is going to have every single possible scribed finding associated with it. Just like any medical disease has got a variety of onsets, and as I was alluding to when I talked about the fraternal twins in the same environment essentially got exposed to the same alcohol exposure where some were more severely affected than others.

So obviously there is a genetic variation. So, no, I think that you look for the constellation findings.

One finding by itself does not necessarily make the diagnosis. And I did not mean to mislead the opposing counsel regarding like pegged teeth or whatever, like that thing of pegged teeth make the diagnosis for me. That is not the case whatsoever.

I am just saying that the findings that Mr. Williams has are very consistent with the diagnosis of fetal alcohol syndrome from the standpoint of stature, from the multiple physical findings that he has and his related behavior and learning disabilities.

* * *

[TESTIMONY OF DR. ROBIN LADUE]

[490] And I just want to briefly go through to give you an idea that even people who look what you and I would term as fairly normal still share the same pattern of brain damage and the same behavior problems, even though the external manifestation, the dysmorphology that Dr. Pinckert talked about may vary in severity.

But behavior problems that we see are pretty consistent regardless of the external features or the IQ. So just to give you an idea of the variety and severity of dysmorphology that we see among people with fetal alcohol syndrome.

And this is a young woman who has FAS, her baby does not because she did not drink during pregnancy. Her baby is normal. She is not raising her baby because she could not even take care of her own needs, let alone the complex task it would take to raise a child. Those are all my slides.

Q I notice that on a few of the pages of your problems and concerns chart, you note that violent behavior may be a problem?

A That is correct.

Q And I wonder if you could talk about that for a minute generically about FAS and whether [491] or not there is a propensity for violence in people that are fetal alcohol syndrome?

A I wouldn't say based on a research that there is necessarily a propensity for violent behavior. A lot of it depends on the underlying personality that people have, just as any person may or may not be violent.

Of a hundred people in a room, you may have some that are and some that aren't. The situation with people with fetal alcohol syndrome a lot of times is that they are not able to predict the outcome of their behavior and the outcome of dangerous situations.

So they get themselves in situations where they are very easily influenced. It is not that they are inherently

more violent. A lot of times it is simply not being able to understand that if you pick up a gun and pull the trigger, someone is going to get hurt. They don't follow out the logical consequences.

However, we have had in my experience for the past sixteen years, I have met maybe one or two people, maybe a few more than that, who had FAS and also really had sociopathic personalities, but that has been the exception rather [492] than the rule.

What we find is that the more structured and safe the external environment the person is in, the less issues we see them in terms of violence.

Q And now I would like to talk about Terry specifically and his history. You have reviewed a number of records regarding Terry, and you have set those forth in a report that you have compiled, and I won't ask you to describe them all again.

What I would ask you to do is, do you have a pen there?

A Yes.

Q Can you as we go through these sheets check off the boxes that apply to Terry? The first sheet is age zero to five years. And have you reviewed very much information about Terry as a baby?

A I have very little information about Terry up to the age of five other than as with many, many of our patients he was neglected and abused.

Beyond that, I also know that he was very small according to reports at birth, but beyond that I don't have

that much information really about his actual neurological functioning at zero to five years.

[493] Q Have you reviewed the affidavit from Terry's mother?

A Yes, I have.

Q And did you notice anything in that affidavit that would help you to note any of the problems on the first page?

A If I could have a moment to go through it again.

Q Sure.

A On Page 2 of her affidavit there are a couple of things take I noted, that she had received no prenatal care and that the children were removed from her custody for at least two years, and that Terry was abused when he was a child. I don't have the ages specifically on that.

* * *

[499] Q Could you turn to the last page, then, Dr. Doctor LaDue, age eighteen plus. And I would like to talk just as we go through, increased expectations as a patient by others.

Could you go through and tell me the things that you have noted in your report as significant in Terry's adult life?

[500] A Well it gets a little tricky, as I said, the problems we see in ages eighteen and up are based on the fact that he has had this neurological damage all his life.

And that the problems we are seeing, if we are seeing them at age thirty-one, they were there as the reports

indicate that I have and the background I have, all his life.

So it is a little difficult to just say well this happened at age thirty-one when the brain damage has been there.

But what I can do, and it is a little difficult because it may be talking about some of the findings that I found that are consistent with fetal alcohol syndrome and consistent with the problems we see at age eighteen.

Certainly the poor comprehension of social expectations. When I met with Mr. Williams last week and did the formal psychological evaluation, one of the scores that was definitely lowered on his Wexler Intelligence Scale was comprehension and similarities, which is a measure of abstracting abilities.

In the setting that he is in where he is protected, setting such as job training [501] doesn't apply, medical care doesn't apply, birth control doesn't apply, child care doesn't apply, economic support and protection don't apply.

And in a two-hour sitting in terms of the unpredictable and impulsive behavior, what I have are the test results that did not indicate that he was particularly aggressive or violent in terms of his personality, but that he is likely to be impulsive.

So even though I didn't see those things myself, the testing results would indicate that there may or may not be present, those things may or may not be present.

Q You talked earlier about follower behavior and about people with FAS not being leaders but being followers. Did your tests reveal anything about Terry in that or your interview with him?

A What I said is is that they tended to be more reactors and have difficulty planning out actions. They are not real good at planning, and the testing that I did certainly showed that.

There is one test called picture arrangement on the Wexler test that looks at a person's ability to pick out subtle social queues and to actually put a series of cards in order to tell a [502] story accurately.

And Mr. Williams had a very, very difficult time in doing that. And that is one of the things you look at, can they follow action and a story in a plan from beginning to end.

And he had a great deal of difficulty doing that. There were other tests that looked at planning and problem-solving ability, and those scores were lower, too.

Q And you also spoke about frontal lobe brain damage disrupting a person's ability to see the consequences of their action. And I am wondering if you could describe whether you see anything in Terry's records that show that same sort of problem?

A From the records or from the testing results?

Q From either.

A I would have to review the records real quickly, but certainly from the testing results in looking at the picture arrangement test, the block design test, and some

of the other tests on the intelligence test, his ability to problem solve and to plan were very, very compromised.

* * *

[507] Q Have you evaluated people with fetal alcohol syndrome for their competency to waive their rights?

A Not specifically.

Q Is that the sort of decision that we are talking about when we say complex decision, thinking through several steps with a final result that would have a significant impact?

A You mean specifically the decision to waive rights?

Q Uh-huh.

A It is a very complex decision that has all kinds of implications down the road that someone with FAS may or may not understand. It depends on several factors, how it is presented to them, how they are functioning on any given day, but that is a very complex decision.

Q I would like to talk a little bit about fetal alcohol syndrome and the reporting skills that a person would have.

You told me that you did some testing with Terry on this and found him to be highly [508] suggestible. Could you explain what that is and what that means?

A It was interesting in working with Mr. Williams that he would pick up information that Dr. Pinckert and I were sharing with him and it would become incorporated into his own self-report.

And sometimes it wasn't even accurate information, like how long he had worked in the tobacco fields. And it was as if he was agreeing to information almost completely without any understanding that the information wasn't accurate and what the inaccuracies would mean.

There were times when he gave inaccurate information when he would have been far better off, such as a drinking history, to give us accurate information.

So that again not really seeming to understand what he was reporting on and the consequences of what he was reporting on without making the connection of down the road of what all that would mean.

Q Is this an example of what you were referring to the eight ball, that the answer closest to the front of the brain sort of rises to the top?

A That would be a good example of it. It [509] is whatever is there is what you get. And in asking the same question of Mr. Williams a couple of times, we got different answers. And that is again consistent with what I was saying of how the brain works with people with FAS.

Q And you also said that he incorporated information you had provided to him into his story to you as if it was reality?

A That is correct.

Q With other people you have worked with with FAS and also in reviewing Mr. Williams' records, what kind of information are you talking about? Do people with FAS literally incorporate – would they read something in a book and think it was real?

A You are asking about five questions. Can you give me one question at a time?

Q How far does it go? Would somebody with FAS read a novel and think that that novel had really happened and was real?

A Perhaps, perhaps not; it depends on a lot of different factors.

Q How about watching a movie or television, I guess was the example you gave?

A Again, sometimes yes, sometimes no. I can give you an example of a woman I work with who [510] has three children with FAS. And her son has an IQ of about 105.

And he was shown some pictures one time taken just after he was placed in the adoptive home when he was very, very young. And he'll look at the pictures, and then he will come back, and he has actually done this with me a couple of times, and talked about these things as if he remembered them and create a whole story around these pictures where he would have absolutely no way of even knowing any of the details.

But when you ask him the accuracy of it, he would be absolutely sure that that was accurate. However you could tell a different story about the pictures, and you would get a different story back the next time you asked him about the pictures.

Q Would it be possible for a person with FAS to confuse their dreams with reality?

A It is possible.

Q I would like to talk about poor impulse control now. You had mentioned that poor impulse control is a hallmark of FAS. Did you see evidence of poor impulse control in Terry's records?

A In Terry's record or in the report?

[511] Q Well in his criminal records that you reviewed?

A In looking at some of the juvenile records, and this is one that I have heard a lot from our patients with FAS is pulling the fire alarm. We hear that a lot.

And when you ask a person why they did it, they couldn't even give you any kind of logical thinking. It was just like there and they did it. So that was an example, that was the one that stands out most clearly in my mind.

Q Dr. LaDue, when you are consulted with by courts to evaluate people for FAS, are you provided with –

A Excuse me, I need to get some clarification. Evaluating the consequences of FAS? Because I don't evaluate for FAS.

Q Yes, the consequences. Are you given material to review?

A That is always one of my requirements.

Q And what sorts of materials do you require?

A Well any time I am doing an evaluation, I want family records if they are available or at least a family history, school records.

[512] If it is for the legal evaluations that I do, I want any and all court records, any placement records. Preferably if we can get, which is not always the case, medical records.

So there is a whole list of records that I want ahead of time. I like to get if possible again if it is for the criminal system, police reports, victim statements, and things like that.

Q Who normally provides you with this array of information when you are doing work for the courts?

A It depends. If I am doing work with the juvenile system, it usually comes through the probation officer, sometimes through – generally through the attorneys.

It depends on which side, sometimes from the defense attorneys. But with the juveniles I work with, it comes generally through the probation officer.

Q And with adults that you work with?

A Generally through the attorneys.

Q Thank you. You reviewed the tests that Drs. Ryans, Mansheim and Centor performed on Terry Williams as part of their evaluations in 1986?

[513] A I reviewed their reports. I am not aware of a great deal of specific tests that they used other than the RORSCHACH. Said a Wexler was administered, but I was never able to find the actual report that indicated from that.

Q Why did you give different tests than those psychologists gave, first of all? And secondly why did their tests not reveal any neurological impairment?

A That is an extremely couple of difficult questions to answer. I don't know why our test batteries are different.

I have a very standard test battery that I use, and then I use some additional tests. Part of it has to do with research that I have been involved in that we have a standardized battery.

And then for forensic evaluation, for court evaluation, for competency evaluation, I always add several tests beyond that because I am looking for several things.

I want to make sure that my tests are giving me inter-test reliability. I want to make sure that the scores are accurate.

I want to make sure that I have [514] enough validity from the information that I get, so I tend to do a fairly large battery of tests. That is my personal preference just to make sure the information I get is reliable and valid. As to why our test battery is different, I couldn't speak to that. I don't know the motivation or reason why.

Q A RORSCHACH was given to Terry in 1986, as I recall?

A Uh-huh.

Q Do you recall what the results of that were?

A If I could look for a moment? From my understanding, it said that there was no signs of organicity, which I was a little bit surprised at, because generally the RORSCHACH is not used as a test for screening organicity.

But if I remember correctly, it also said that there were no signs of aggression or hostility. And if I can just take a moment here and find that report.

I have one here signed by Dr. Mansheim about him being oriented to time, place and space and about his memory and his intelligence being a little bit lower. But that is not the one I am looking for.

[515] Q It is Dr. Centor's, I believe.

A What it says, previous testing showed him to be functioning on borderline level of intelligence and he showed no sign of organicity.

His RORSCHACH was not different from his previous one and again showed no signs of hostility and aggression. It is believed that the patient is competent to stand trial and was competent at the time of the alleged crime. That is his in results and summary section on Page 2, report dated August 11, 1986.

Q And the results of your RORSCHACH were different?

A No, they were very similar. A little bit of immaturity, which you would expect given Terry's IQ and his social development. And again no overt signs of hostility or aggression. So they were consistent with what Dr. Centor found in 1986.

Q Just a few more questions. You have discussed the difficulty that people with FAS have in making decisions and that they will frequently give different answers to the same question?

A That is correct.

Q Do you think having reviewed the record of confessions, recantations, and subsequent [516] confessions that Terry gave and subsequent recantations, that that could possibly be explained by FAS?

A It is a pattern of behavior that is not inconsistent with fetal alcohol syndrome and with frontal lobe brain damage.

Q And you also spoke about people with fetal alcohol syndrome incorporating information they receive into what they perceive to be reality.

Do you think that the fact that there were six months between the time that Terry confessed and the death of Mr. Stone may have had an impact on the reliability of his confessions?

A That is a very difficult question to answer because I have no idea who Mr. Williams was associating with, I have no idea who he had talked to, I have no idea as to what information he might have gathered from any place around.

It is possible, but I couldn't draw a firm conclusion because I have no idea what he was doing during those six months.

Q You prepared a report regarding your psychological evaluation of Terry Williams?

A That is correct.

Q Is this the report that you prepared [517] regarding Terry Williams?

A Yes, it is.

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REDIRECT EXAMINATION

BY MS. TARLOW:

Q I just have two things to follow up with. In general throughout the country are there psychologists who specialized in FAS in 1986?

A Yes, there were.

Q And in your opinion how would Mr. Williams do in the future in a structured and supervised environment such as a prison?

A Based on the information in terms of how he has done in prison at this point in time, it can be expected that he would continue to do very well in a structured, supervised setting.

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[EXHIBITS INTRODUCED AT STATE HABEAS HEARING REPRODUCED IN SEPARATE VOLUME]

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF DANVILLE

TERRY WILLIAMS,
Petitioner,

V. Case No. LP88-81

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTIONAL CENTER,
Respondent.

PRELIMINARY STATEMENT

Petitioner was tried by a jury in this Court on September 29 and 30, 1986, and was convicted of the capital murder of Harris Thomas Stone, while in the commission of the armed robbery of Stone. The jury also found the petitioner guilty of the robbery of Stone during the course of the capital murder and fixed his punishment at confinement in the penitentiary for seven years. On September 30, 1986, in the second stage of the bifurcated proceeding, the same jury fixed petitioner's sentence at death on the capital murder charge. Following receipt of a post-conviction report of a probation officer, this Court held a sentencing hearing on November 19, 1986, and entered judgment in accordance with the jury's verdicts as to both guilt and sentence. Williams' convictions and death sentences were affirmed by the Supreme Court of Virginia on September 4, 1987. *Williams* v. *Commonwealth*, 234 Va. 168, 360 S.E.2nd 361 (1987), *cert denied*, 484 U.S. 1020 (1988).

On August 26, 1988, Petitioner filed a petition for a writ of habeas corpus, which was answered in due course by the respondent. On August 8, 1989, argument was

heard in the Circuit Court of Danville, and resulted in the dismissal of numerous claims.

On or about April 24, 1995, the petitioner filed in this Court an amended petition for a writ of habeas corpus. The respondent filed a response to the amended petition on or about may 16, 1995. In that response, counsel for the respondent noted that this Court had previously dismissed the following allegations appearing in the amended petition: I(A), I(B), I(C), I(D), II(A), II(B), II(C), II(D), III(A), III(B), IV, V, VI, VIII(B), VIII(D), VIII(E), VIII(H), IX(A), IX(B), IX(C), IX(D), XI, XII(A), XII(B), XIV, XV. XVI and XVII.

Counsel for the respondent further noted that subgrounds VIII(A), VIII(G) and VIII(I) of the amended petition were new, and were allegations of prosecutorial misconduct, and as such, these subgrounds were procedurally defaulted under the rule of *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974).

Ground X of the amended petition was also new, and is a substantive claim that petitioner's death sentence was based upon consideration of an improper aggravating circumstance. This, allegation X is procedurally defaulted under the rule of *Slayton* v. *Parrigran*, and it appears that petitioner is attempting what he previously attempted in ground XV of the original petition. That is, to have this Court review actions of the Supreme Court of Virginia. Finally, petitioner has not been granted leave by this Court to amend his original petition with new substantive claims.

On June 15 and 16, 1995, this Court held an evidentiary hearing on the issues of ineffective assistance of counsel. On or about September 1, 1995, counsel for the petitioner filed Petitioner's Proposed Finding of Fact and Conclusions of Law. Respondent's proposed finding of fact and conclusions of law followed.

On July 1, 1995, however, this Court lost jurisdiction over this case, pursuant to Virginia Code § 8.01-654.

On November 15, 1995, respondent filed a motion to transfer this case to the Supreme Court of Virginia, pursuant to Rule 5:7A, Rules of the Supreme Court of Virginia. The petitioner objected, and on February 14, 1996, oral argument was heard on respondent's motion. This Court granted respondent's motion and transferred this case to the Supreme Court of Virginia.

On March 22, 1996, respondent moved the Supreme Court of Virginia to remand this case to this Court, for the entry of findings of fact and recommended conclusions of law on specific claims. On or about April 15, 1996, petitioner filed an opposition to respondent's remand motion, arguing that respondent's motion "narrow(ed) . . . the issues which the Circuit Court could address . . . "

On May 6, 1996, the Supreme Court of Virginia entered an order directing this Court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel, as alleged in Claim VII of the amended petition for writ of habeas corpus, to this Court pursuant to Virginia Code Section 8.01-654(C)(3)." on June 24, 1996, this Court heard arguments from counsel on the issue of the ineffective assistance of counsel claim as alleged in claim VII of the

amended petition. As a result, this report is submitted as to the findings of fact and recommended conclusions of law by this Court on that issue in accordance with the order of May 6, 1996 of the Supreme Court of Virginia.

FINDINGS OF FACT

I. Initial Findings of Fact

On July 8, 1986, E. L. Motley, Jr., was appointed to represent the petitioner on charges of capital murder and robbery. He also represented the petitioner on other charges of malicious wounding, grand larceny and arson. He was joined by Robert J. Smitherman who was appointed to serve as co-counsel on the capital murder and robbery charges several months later. Mr. Motley had previous experience in capital murder cases, but was afforded co-counsel as was the custom at that time to aid lead counsel in serious murder cases in this court. Mr. Smitherman had known Mr. Motley for approximately two years before the trial and they worked well together. Both Motley and Smitherman represented the petitioner leading up to the trial, during the trial, and thereafter on petitioner's appeal.

Petitioner alleges that he was denied his Sixth Amendment right to counsel because E. L. Motley, Jr. was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically, Motley did

not begin to have problems related to his depression until the late spring or early summer of 1987. (H.Tr.22).[1] Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.

It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. (H.Tr.85). Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

During the two years that he knew Motley, Smitherman never noticed anything unusual about Motley's ability to represent clients. Smitherman noticed nothing unusual about motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. (H.Tr.177-178). Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams. (H.Tr.180-181).

Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E. L. Motley was acting under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is

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[1] References to the transcript of the evidentiary hearing shall be cited as "H.Tr."

based on the mental problems suffered by Mr. Motley, such claims lack merit.

In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

The petitioner also alleges that he (Williams) is mentally retarded or suffers mental impairment such that he is not competent in several respects, but despite petitioner's claims, they are not borne out by the evidence. Petitioner obviously has some problems, but he is not mentally retarded and has an I.Q. of 73. (H.Tr. at 365) The petitioner was competent to stand trial. (H.Tr. at 214-215). The results of petitioner's EEG were normal, his neurological tests were normal, and his skull film was normal. (H.Tr.234, 237) Indeed, it would appear that petitioner suffers from no neurological abnormalities although it is apparent that he does have some problems. (H.Tr. at 316) The Court does not believe that the evidence clearly establishes petitioner suffers from Fetal Alcohol Syndrome or the lesser abnormality of Fetal Alcohol Effect. (H.Tr. 215-216, 272-273).

II. Petitioner's trial attorneys were both experienced in criminal defense work and thoroughly prepared the case in defense of capital murder.

Terry Williams was represented at trial and on direct appeal by E. L. Motley and Robert J. Smitherman. Motley was appointed to represent Williams in July, 1986. Motley previously had tried two capital murder cases, and numerous serious felony cases. As part of his preparation of trial, Motley reviewed his file from the Johnny Watkins

capital murder case. (H.Tr. 48-50). Ten days after his appointment, Motley filed a motion for appointment of co-counsel. (App. 9, 13).[2] Co-counsel, Mr. Smitherman, was appointed on August 29, 1986. (App. 27).

Motley filed numerous motions with the Court, including a motion for discovery (App. 14), a motion for independent medical examination (App. 23), and a motion for an investigator. (H.Tr. at 69).

Motley also investigated the crime in depth. He investigated the issues of whether the victim had died of alcohol poisoning, had fallen and injured himself, or whether there was any other viable alternative to murder. Despite his efforts, Motley found no credible evidence or credible witnesses to support any of those theories. (H.Tr. 72-74).

Smitherman, a 1984 graduate of the William and Mary Law School, was appointed to assist Motley. Smitherman previously had been Court appointed counsel on felony cases. (H.Tr. 126, 129). Smitherman researched the area of capital murder jurisprudence in Virginia, and spoke often with Motley. (H.Tr. 130).

Smitherman interviewed numerous fact witnesses, as well as the medical examiner. (H.Tr. 135). Smitherman interviewed certain individuals who had information that the victim may have had a previous injury. All of these witnesses had credibility problems, however, and the tactical decision was made that it was best not to use them. (H.Tr. 138-139).

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[2] Appendix references are to the appendix on direct appeal.

III. Motley and Smitherman provided Williams with effective and professional representation.[3]

A. E. L. Motley suffered from no mental impairment during the course of his representation of Williams.

1. *Williams was re-presented by competent and professional counsel.*

As discussed earlier, the Court finds that E. L. Motley was suffering from no mental impairment during the course of his representation of Williams. Having observed Mr. Motley at trial, and having considered all of the evidence presented at the evidentiary hearing, including the evidence by live witnesses and by affidavit, as well as all other evidence properly before the Court, the Court is of the opinion that Mr. Motley's depression had no impact on Williams' case. Mr. Motley's problems did not begin to manifest themselves until the late spring or early summer of 1987. (H.Tr.22) And, even when they did manifest themselves, Mr. Motley's problems were concentrated in the area of civil matters, such as his handling of trust accounts. Mr. Motley was able to handle criminal matters without difficulty. (H.Tr.47-48).

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[3] For the sake of convenience, the enumeration of these findings mirrors the allegations lodged against counsel in Allegation VII of the amended petition as closely as possible. In some instances, however, issues have been sub-divided for convenience.

2. *The fees paid to counsel had no adverse effect on their performance.*

The petitioner has alleged the fees paid to counsel affected the performance of counsel in their representation of Williams. Mr. Motley received compensation in the amount of $1,960. Mr. Smitherman received compensation in the amount of $1,400. (See Exhibit 10). Williams has failed to show any nexus between the fees afforded counsel and their performance in his representation. After reviewing the record of trial, as well as the entire record of the plenary hearing, this Court finds that the fees paid to Williams' counsel had no bearing whatsoever on their performance during the course of their representation of Williams.

3. *The procedural default rules of Slayton v. Parrigan, and Hawks v. Cox, have been appropriately applied.*

Williams argues that the procedural default of *Slayton* and *Hawks*, which have been applied to dismiss certain claims in this action,[4] should not have been applied because they were done so "at a time that it was not known that the lead counsel was suffering from mental impairment . . . " As discussed previously, this Court has determined that lead counsel was under no mental disability of impairment during the time of his representation of Williams. And, there is absolutely no indication in the record that Mr. Smitherman, co-counsel in this case, was suffering under any mental impairment. Given these

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[4] These claims have been noted previously.

facts, this Court finds no reason to reconsider its earlier rulings with respect to the *Slayton* and *Hawks* rules.

B. Counsel's performance throughout the proceedings was both professional and competent.

As previously discussed, this Court has concluded that counsel, E. L. Motley, was suffering from no disability during the course of this representation of Williams. Moreover, Williams has introduced no evidence whatsoever that co-counsel, Robert J. Smitherman, was ineffective during the course of his representation of Williams.

C. The performance of counsel at the guilt phase of the trial was both professional and competent.

1. *Petitioner was competent.*

The record indicates that Williams previously was found competent to stand trial. Specifically, Williams was found "competent to plead and to stand trial in that he does not lack substantial capacity to understand the proceedings against him or to assist in his own defense". (App.17). Moreover, Williams had a "good understanding" of the [sic] "the roles and functions of the various participants in courtroom procedures, the various pleas and their consequences, and related court issues. . . . " *(Id.)* Counsel was justified in relying on this information.

Moreover, no evidence has been presented to show that Williams was suffering from any mental incompetency. A sleep-deprived EEG was performed on Williams, with normal results, (H.Tr. at 234). The results of Williams' neurological tests were normal. Williams' skull film was normal. (H.Tr.237). While there is an indication that Williams had contracted syphilis, the evidence reveals that he was appropriately treated for that disease. (H.Tr.at 241). In any event, Williams has presented no evidence of a nexus between his syphilis and the trial of this case. As has been previously mentioned by this Court, it has not been proven that Williams suffered from Fetal Alcohol Syndrome.

2. *Counsel fully and adequately investigated the issues of robbery and cause of death.*

Counsel interviewed numerous witnesses who allegedly had information that the victim may have had a previous injury. All of the witnesses had significant "negatives". (H.Tr.139). Based on the foregoing, counsel made the tactical decision that it was best not to call these individuals. (H.Tr. 101-102, 138-139).

Moreover, the confession given by Williams *prior* to the autopsy being performed, "dovetailed" with the autopsy report. (H.Tr.101-102). In Williams' confession of April 25, 1986, he stated that the victim was "really drunk" and that he, "sort of passed out . . . " Williams states that he went into the bathroom and "got the mattock that was behind the clothes and . . . I struck him with the mattock in this chest." Williams stated that the victim then "gazed up and turned over, I hit him again in the

back with it. From there, I went into his pocket and took his wallet, it was $3.00 in his wallet. I took the $3.00 and left. I went right across the bridge, I took the $3.00 out the wallet and throwed the wallet over the bridge . . . " (App. 776). In his typed statement of the same date, Williams states that he went into the bathroom and saw the mattock. He picked up the mattock and hit the victim "on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the maddax (sic). He felt back on his (sic) bed." Williams went on to state, "I took his wallet from his pocket." (App. 779).

The petitioner has produced no evidence to dispute the facts surrounding the cause of death which were found at trial and on appeal. (App. 272). Dr. David Oxley, the Medical Examiner who performed the autopsy on the victim, did not receive the victim's body until July 1, 1986. The body had been exhumed. (App. 267). When the body was opened, there were fractures on the fourth and fifth ribs on the left near the breastbone, in the area of the chest. There was hemorrhage in the muscle and soft tissue around the ribs. (App. 268). The fractured ribs had punctured the left lung. The ribs also caused bleeding into the chest cavity on the left side. (App. 269). Dr. Oxley determined that the rib displacement was caused by a "fairly heavy blow". Dr. Oxley determined that the injury occurred while the victim was alive. (App. 270) Dr. Oxley determined that the cause of death was "blunt force injury to the chest with hemothorax, that's bleeding into the chest cavity". (App. 272).

Counsel for petitioner in this case were faced with a confession by the petitioner which supplied all the details

of the murder and the robbery. Speculative questioning of certain witnesses in this case would have only widened the credibility gap of counsel and the petitioner in his defense.

The court also finds that counsel conducted an adequate investigation into the robbery. Counsel interviewed witnesses, including members of the victim's family and individuals who found the body. The issue was argued both at trial and on appeal. *See Williams*, 234 Va. at 175, 360 S.E.2nd at 365. (H.Tr. 151-153). Moreover, Williams had offered nothing more than speculation on this issue, and the robbery was entirely consistent with Williams' confession.

On the issue of guilt or innocence, the Court finds that given the evidence in this case, counsel conducted a reasonable and thorough investigation.

3. *Counsel was justified in relying on Dr. Oxley's conclusion.*

The Court finds that the cause of death of Harris Thomas Stone, the victim in this case, was a blunt force injury to the chest with hemothorax, that is, bleeding into the chest cavity. (App. 272). Stone's ribs were broken and displaced sufficiently to lacerate his lung. This is in contrast to what is commonly called a "cracked rib," where there is no displacement. The Court finds that the injury occurred while Stone was alive. (App. 269-270). The Court finds further that alcohol, at a level of .41%, "is a rather severe respiratory depressant". The alcohol in Stone's system accelerated his death. (App. 271-272).

To the extent that there is a disagreement between the findings of Dr. Oxley at trial, and the evidence presented by Williams, this Court finds that Dr. Oxley's testimony at trial is more persuasive. And, the Court finds that Dr. Oxley's testimony at the evidentiary hearing that it was "possible" that Stone's injuries could have been caused by a fall, is speculative, at best, and is insignificant when viewed in light of all of this case. (H.Tr. 199-121). Further, the petitioner himself, through his confessions had already related how the homicide occurred and what he did to bring on Mr. Stone's death. The Court finds that Stone's death was a homicide, and that it was entirely consistent with the information given by Williams in his confession. (H.Tr. at 123).

4. *As stated earlier, the Court is not convinced that Terry Williams suffers from Fetal Alcohol Syndrome.*

The evidence on this issue is extensive, but not persuasive.

The evidence does not clearly establish that Williams suffers from Fetal Alcohol Syndrome. As stated earlier, the Court does not know if Williams suffers from Fetal Alcohol, but moreover, and more importantly, the Court finds that it is *not* likely that laymen, such as Mr. Motley or Mr. Smitherman, would have been aware of Fetal Alcohol Syndrome in 1986. While Dr. Ryans, a forensic psychiatrist, was familiar with Fetal Alcohol Syndrome in

1986,[5] Dr. Arthur Centor, a psychologist, knew nothing of Fetal Alcohol Syndrome in 1986. (H.Tr.at 316). Given that a well-respected mental health professional was not familiar with Fetal Alcohol Syndrome in 1986, it is unreasonable to expect laymen, such as Mr. Motley or Mr. Smitherman, to have been familiar with Fetal Alcohol Syndrome during that time period. As it is unreasonable to expect these attorneys to be familiar with Fetal Alcohol Syndrome, they were not ineffective for their failure to investigate whether Williams suffered from Fetal Alcohol Syndrome.

5. *Counsel's conduct with regard to the confession and suppression hearing was competent and professional.*

The Court has previously found that Williams was mentally competent. Thus, counsel had no reason to continue to challenge this point. (H.Tr. at 51-52). The majority of the circumstances surrounding the confession have been considered, both by this Court at trial and by the Supreme Court of Virginia on appeal. This Court finds, that counsel made a reasonable and professional effort to suppress Williams' confession. The fact that Williams was the first individual interviewed regarding the anonymous letter is of no consequence. Williams was interviewed initially because the police believed that the letter may have referred to another crime that was under investigation.

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[5] Dr. Ryans determined that Williams does not suffer from Fetal Alcohol Syndrome.

The interview of Williams was not coercive, and the fact that Williams stated that he was seeking "help . . . falls far short of a confession induced by the hope of gaining some advantage or avoidance of some evil in reference to the proceeding against the defendant." *Williams* v. *Commonwealth*, 234 Va. 168, 174, 360, S.E.2d 361, 365 (1987), *cert. denied*, 484 U.S. 1020 (1988). Moreover, Williams alleges that the police attempted to coach him during the course of his confession. This Court has considered this allegation before, and has rejected it. This Court, again, rejects this testimony, and finds that Williams was not coached. Williams also alleges that counsel failed to note discrepancies within the confessions. To the contrary, this Court notes that the alleged discrepancies were also considered by the Supreme Court of Virginia on direct appeal. *See Williams*, 234 Va. at 174-175, 360 S.E.2nd at 365. Williams maintains that counsel should have requested the assistance of an expert on *false confessions*. Such a motion would have been futile, however, as this Court is aware of no authority, and Williams has cited none, which would have entitled him to such an expert.

Williams alleges that counsel was ineffective for failing to object to the use of Dr. Mansheim during the suppression hearing. First, as Williams has failed to state with specificity what testimony it is that he finds objectionable, this Court has deemed this allegation to be waived. Second, the Court does not find that Dr. Mansheim's testimony was objectionable. There is no reason why Mansheim could not have been called as a witness for the Commonwealth. *See* § 19.2-264.3:1(D), Code of Virginia (dealing with expert testimony during the penalty phase of trial). Finally, the Court finds no prejudice

in the Commonwealth's use of Dr. Mansheim during the suppression hearing.

Williams next alleges that counsel was ineffective for failing to object to his interrogation in the absence of counsel. First, in 1986, Williams was represented by counsel on a wholly-unrelated charge. Second, this Court finds that Williams initiated contact with the police by means of his letter.

Williams next alleges that counsel failed to seek the disqualification of the Commonwealth's Attorney, and that counsel failed to object to the Commonwealth's Attorney's *testimony*. The Court finds no reason why the commonwealth's Attorney, William H. Fuller, III, should have been disqualified at trial. It is "not desirable for the Commonwealth's Attorney to testify as a witness on a material point in a case". *Bennett* v. *Commonwealth*, 236 Va. 448, 464, 374 S.E.2d 303, 313 (1988) Although the Commonwealth's Attorney was present during the questioning of Williams, he did not take an active role in the questioning. Moreover, other witnesses were available that were present during questioning, and who took a role in the questioning, that were more suitable to be called at trial. Finally, this Court finds that the questioning of Williams by the Commonwealth's Attorney at the suppression hearing was appropriate and proper cross-examination.

6. *No evidence that counsel did not advise Williams of his options.*

Williams has presented no evidence that counsel failed to advise him about this possible pleas and

defenses. Indeed, Williams indicated that he was pleased with counsels' performance, even after he had been convicted of capital murder. (App. 727) The Court finds no merit to this allegation.

D. Counsel's performance at the sentencing phase of the trial.

1. *Counsel's actions at the sentencing phase are the only real concern of the trial court in this case.*

Williams has made numerous allegations against Motley and Smitherman for failing to present mitigation evidence. Among these allegations are that Williams was neglected and mistreated as a child, that his parents drank, and fought often, and that he was beaten by his father. Counsel's investigation into these matters, in light of the stage of the proceeding, was lacking.

For example, the petitioner's juvenile records from Beaumont Correctional Center reveal a report which described conditions in the Williams household. (See Petitioner's Exhibit #8) . (Tr. 334-335; 343-348; and also Petitioner's Exhibits #30-33). This report contained information that counsel should have investigated thoroughly in an effort to ascertain what might be relevant and significant as to the contents contained therein so this evidence could be presented as mitigating evidence at the sentencing phase.

Evidence of a mitigating nature was also available through petitioner's wife and ten year old daughter.

While cross-examination might be costly, in balance, Williams' daughter visited her father often and she and her mother considered him a good and loving father. (See Petitioner's Exhibit #28).

Probably the most persuasive mitigating evidence which was not tendered to the jury involved the failure to interview and call Bruce Elliott as a witness during the sentencing phase. Prior to trial, this witness called counsel and offered his help, but counsel never followed up by talking to the witness. Mr. Elliott, a certified public accountant and partner in a Harrisonburg, Virginia accounting firm would have testified that he had known Terry Williams since 1978. His testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially. His affidavit also states he would have testified that Williams took pride in his achievements, such as his graduation from carpentry school at the Martinsville Correctional Facility. (See Petitioner's Exhibit #26). This testimony from a well-educated professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence.

It is obvious that counsel made a tactical decision to focus attention at the penalty phase on Williams' confession, the object being to convince the jury that Williams' life should be spared due to the fact that he had given an unsolicited confession to the police. (H.Tr. 981; see generally App. 732-750).

Counsel made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth

from reminding the jury of the "horrible and terrible crimes that Mr. Williams had done," (H.Tr. 157), but it is troubling to this Court that favorable evidence was not pursued and introduced for "whatever it was worth" when the decision which was to be made by a jury involved *life or death*. The question becomes: Were counsel's actions reasonable in this area? With so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment.

2. *The testimony of Drs. Centor and Ryans was proper.*

Williams contends that counsel was ineffective for failing to object to the testimony of Drs. Centor and Ryans. Dr. Centor was appointed by the Court to examine Williams pursuant to Virginia law, upon a representation by Mr. Motley that Williams "may lack substantial capacity to understand the proceedings against him or to assist his attorney in his own defense". (App. 10). An order was entered by this Court on July 10, 1986, appointing Dr. Centor to submit a full report and summary of this conclusions [sic] to the Court in accordance with Virginia Code §§ 19.2-169.1(d), 19.2-169.5(d) and 19.2-264.3:1(c). (App. 10-12). Dr. Centor filed an appropriate report with this Court on August 13, 1986. (App. 17-18). That report indicated that it dealt solely with Williams' competency

to plead, and that a full report on the main issues was being forwarded to Mr. Motley. *Id.*[6]

While this Court appointed Dr. Centor to perform this evaluation, this Court finds that in order for a full and proper report to be prepared, other health care professionals would be obliged to contribute to the examination. While Dr. Ryans was not specifically appointed by this Court, this Court recognizes that Dr. Ryans was on the evaluation team at Central State Hospital in Petersburg. Other individuals on this team also were necessary to complete the proper examination of Williams. (H.Tr. at 230-231). As Dr. Ryans obviously was a part of Dr. Centor's team at Central State Hospital (See App. 11), it was entirely appropriate, under this Court's order, for Dr. Ryans to examine Williams in conjunction with Dr. Centor's evaluation.

Both Dr. Ryans and Dr. Centor testified at the hearing to suppress Williams' confession. Although Williams alleges that this testimony was improper and that counsel was ineffective for failing to object to it, Williams has failed to point to that testimony which he alleges was improper. This Court has found none.

Dr. Ryans and Dr. Centor also testified at the penalty phase of the trial. Both witnesses testified that, based on Williams' criminal history, he constituted a future danger. (App. 677-678, 690-692). Moreover, the Court finds no

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[6] It is readily apparent, and the Court so finds, that based on the order filed by the Court and by Dr. Centor's response, that any reference to "aggravation" in this Court's order was mere excess verbiage.

evidence that Dr. Centor's report, produced under the provisions of Virginia Code §§ 19.2-169.5 and 19.2-264.3:1(D), was improperly forwarded to the Commonwealth. To the contrary, Dr. Centor indicated that his report, prepared under these sections, was forwarded only to Mr. Motley. (App. 17-18).

It is obvious to this Court that, while Dr. Centor originally believed that there was a "low probability that [Williams] would commit criminal acts Of violence" in the future (H.Tr. 305), he changed his opinion when he learned of Williams' full criminal record. (App. 690-692; H.Tr.309).[7]

This Court also finds that, despite their best efforts, defense counsel was unable to develop any mental health evidence in mitigation. Mr. Motley testified at the hearing that his search for even "a sliver of psychiatric evidence

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[7] Centor did not read Williams his *Miranda* rights. He did, however, advise Williams that the contents of the interview could be discussed if Williams was convicted of capital murder and one of the examiners was called to testify during the sentencing phase of the trial. (H.Tr.303-304). This Court finds, however, that *Miranda* warnings were not required in this case. The competency evaluation was requested by Mr. Motley. Thus, Williams was not compelled by the Court to submit to the examination. *See Payne* v. *Commonwealth*, 233 Va. 460, 470-471, 357 S.E.2d 500, 506 (1987), *cert. denied*, 108 S.Ct. 308 (1987). Moreover, both Ryans and Centor indicated that their opinion on future dangerousness was based on Williams' prior conviction record. It was not based on, and the witnesses did not rely on, any statement made to them by Williams. *See Stewart* v. *Commonwealth*, 245 Va. 222, 224, 427 S.E.2d 394, 408, *cert. denied*, 114 S.Ct 143 (1993).

that would help" turned up nothing. (H.Tr.99). Dr. Mansheim, who had been appointed the defense expert, could not have testified that Williams would not be a danger in the future. Based on these facts, the Court concludes that counsel pursued the reasonable trial strategy of not placing Mansheim on the witness stand where he would be subject to cross-examination on the issue of future dangerousness. (H.Tr.99).

Counsel pursued a reasonable trial strategy in not cross-examining Drs. Centor and Ryans on their previous report. The previous report stated that petitioner did not constitute a future danger. It is obvious that, had counsel sought to cross-examine these experts on their initial report, the Commonwealth would have pointed out on redirect that the initial report was completed before the experts were aware of Williams' criminal history, giving the Commonwealth the opportunity to recount that history yet again.

In any event, this Court finds that the evidence of Williams' prior criminal activity alone was more than sufficient to support a finding of future dangerousness. Williams previously had been convicted of armed robbery (App. 783), burglary and grand larceny (App. 786), and malicious wounding (App. 801). Williams also had been convicted, through [sic] not sentenced, on two indictment [sic] of grand larceny of an automobile and for arson. (App. 808-811). Based on the foregoing, the Court concludes that the evidence was sufficient to show that Williams was a future danger, without the testimony of the mental health experts.

3. *Dr. Mansheim's testimony was proper.*

Counsel requested that this Court order an independent examination to determine (1) whether the defendant was competent to stand trial, and (2) the defendant's mental capacity at the time of the offenses. The defendant made this motion in accordance with *Ake* v. *Oklahoma*. (App. 23). This Court ordered that Dr. Paul A. Mansheim perform said evaluation, pursuant to Virginia Code §§ 19.2-169.1, 19.2-169.5, and 19.2-264.3:1. (App. 25-27).

While it is not disputed that Dr. Mansheim filed his report with this Court, with a copy to the Commonwealth (see App. 33-36), there is no indication in this record that Dr. Mansheim did not continue to serve as a defense expert. Dr. Mansheim's testimony for the Commonwealth at the suppression hearing consisted entirely of his finding on Williams' competency, and was merely cumulative of the testimony of Ryans and Centor. (See App. 425-433).

Most importantly, despite the fact that Dr. Mansheim's report was disseminated, it contained no information which could have been considered prejudicial to Williams'. This Court finds that Williams was not prejudiced by the dissemination of Dr. Mansheim's report[8]. For the most part, Dr. Mansheim's report, like his testimony, was merely cumulative of the findings of Drs. Centor and Ryans. Williams was aware of the charges that he was facing and was aware that he previously had been seen

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[8] It is the report, and not access to the expert, that is protected by Virginia law. *See* Va. Code §§ 19.2-169.5 and 19.2-264.3:1.

by a psychologist. The report included a short biographical sketch of Williams. The report also discussed the charges Williams was facing, as well as his dreams. In short, the report stated that Williams was competent to stand trial and that he was not insane at the time of the offense. The only mitigating factor contained in the report was that, during the armed robbery in 1986, Williams took the bullets out of his gun so that no one would be injured. (App. 33-36). This Court concludes, therefore, that there was nothing in the report warranting an objection from counsel.

This Court finds that counsel communicated with Dr. Mansheim, to the extent that Mansheim had information that would be helpful to the defense. Counsel stated at the hearing that "Dr. Mansheim really didn't have anything much that could help us. I remember Mr. Smitherman and I talked at length with him, I mean right on up to the testimony in the penalty phase hearing. But I don't think Dr. Mansheim had anything really that we could draw on much to help". (H.Tr. 99). Counsel went on to state that Mansheim could not testify that Williams would not be a danger in the future, and that he "probably would have testified that Terry was likely to exhibit violent crimes in the future". (H.Tr. 99). As to the letter that Dr. Mansheim received from Mr. Fuller, Mansheim could state at the hearing that he could only "assume" that the letter made "some impression" upon him. (H.Tr. 202)

Based on the foregoing, this Court finds that Williams was not prejudiced by the dissemination of Dr. Mansheim's report, that counsel acted appropriately with

relation to this report, and that Williams was not prejudiced by Dr. Mansheim's receipt of "raw data" from the Commonwealth.

4. *Investigation of the Solomon incident.*

Williams has failed to present any credible evidence that counsel was ineffective regarding the Solomon matter.

E. Counsel's closing arguments were appropriate.

Williams alleges that counsel was ineffective in his closing arguments for failure to argue a lack of premeditation in the guilt phase and for emphasizing Williams' crimes at the penalty phase. This Court finds that, under the circumstances, counsel's arguments were entirely appropriate.

This Court finds that counsel followed a reasonable strategy of attacking the physical evidence, as well as those elements which would elevate the crime to capital murder. Specifically, counsel pointed out that the murder weapon had not been found, and argued that the injuries suffered by the victim could not have been caused by a mattock. Counsel also pointed to inconsistencies in Williams' various statements. Counsel challenged the evidence on robbery, and pointed out alternative ways in which the victim's wallet could have disappeared. Moreover, this Court finds that counsel did argue a lack of premeditation.

At the penalty phase of the trial, counsel followed a strategy of asking the jury to spare his client's life despite the crimes that he had committed. He argued that Williams had a heart and that he had a conscience. Counsel emphasized to the jury that it was Williams who surrendered himself to the police, and confessed to his crimes. Counsel argued, quite reasonably, that people who admit their wrongs should receive favorable consideration. The jury already was well aware of the crimes that Williams has committed, and the nature of those crimes. Counsel followed a reasonable strategy in confronting those circumstances up front and then arguing for a life sentence, based on the fact that Williams had confessed to his crimes. Under the circumstances of this case, this Court finds that counsel's arguments at both phases of the trial were within the range of effective performance.

F. The jury was properly instructed.

Williams alleges that counsel was ineffective for failing to request jury instructions on mitigation, aggravation and premeditation. Williams also alleges that counsel failed to request a jury instruction explaining the concept of killing during the course of a robbery, and that he failed to proffer instructions relating to parole in Virginia.

First, this Court finds that Williams has failed to proffer any instructions to this Court. In failing to do so, this Court finds that there is a failure of proof on this allegation, and it accordingly fails.

In any event, the Court finds that the jury was properly instructed. It is improper in Virginia to single out any portion of the evidence, including mitigation or

aggravation. *See Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) (Virginia's penalty phase instructions are constitutionally adequate to explain the concept of mitigation) . Next, this Court's instruction on the issue of premeditation was proper. (See Instruction No. 7, App. 836). Williams' statement that an individual must have formed the specific intent to rob the victim prior to the murder to be found guilty of capital murder is an incorrect statement of Virginia law. The theft may occur during or after the murder so long as the evidence supports the conclusion that the killing and the theft were interdependent objects of a common criminal design. *See*, e.g., *Wise. v. Commonwealth*, 230 Va. 322, 334, 337 S.E.2d 715, 733 (1985), *cert. denied*, 475 U.S. 1112 (1986). Finally, the possibility of parole or parole eligibility is inadmissible. *See, e.g., Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836, *cert. denied*, 474 U.S. 865 and 474 U.S. 888 (1988). Thus, as the jury was properly instructed, counsel could not have been ineffective.

G. Failure to raise objections.

Williams alleges that counsel was ineffective for failing to raise numerous objections, including witness testimony pertaining to the Stroud trial, Williams' confession, the court requiring the jury to stay late, psychiatric testimony introduced by the Commonwealth, evidence regarding Williams' prior convictions, the Commonwealth's abuse of discretion in prosecuting Williams for capital murder, and improper argument by the Commonwealth.

The Court points out first that these allegations are entirely conclusory and are, thus, insufficient. *See Penn v. Smyth*, 188 Va. 367, 49 S.E.2nd 600 (1948). Moreover, the Court already has made findings relative to many of these allegations.

In any event, the Court finds that counsel's actions with regard to these issues was entirely proper. First, as the Supreme Court of Virginia stated on the direct appeal of this case, Virginia Code § 19.2-264.4(B) authorizes "the introduction of the details of other criminal conduct". *Williams*, 234 Va. at 182-183, 360 S.E.2d at 370, citing *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807, *cert. denied*, 474 U.S. 975 (1985). As the underlying substantive issue in this ineffective counsel claim has previously been decided against Williams, this Court concludes that counsel's performance was entirely proper.

Williams' alleges that counsel failed to object to the introduction of his confession on the grounds that he previously had invoked his right to counsel. As previously discussed, this Court finds that counsel made a reasonable and professional effort to suppress Williams' confession. This Court has found that, at the time Williams confessed in 1986, he was represented by counsel on a wholly unrelated matter. Second, this Court has also found that Williams initiated contact with the police by means of his letter. This Court sees no reason to disturb these findings. *See Williams*, 234 Va. at 172-173, 360 S.E.2d at 364. This Court also notes that counsel challenged both the admissibility of Williams' confession and the weight that should have been afforded it, at trial and on direct appeal. *Id.* at 172-175, 360 S.E.2d at 364-365. Given these

facts, this Court finds that counsel acted professionally and appropriately with respect to Williams' confession.

Williams' argument that counsel failed to object to the Court requiring the jury to stay late into the evening fails to state a claim. Moreover, there is no indication in the record that the jury was, as Williams claims, "tired and anxious to go home". (Amended Pet. at ¶ 331). The jury was instructed, and retired to the jury room at 9:57 p.m. At 11:03 p.m., the jury returned its verdict. (App. 767). There is no indication in the record that the jury had any difficulty reaching its verdict or that they desired to retire for the evening and return the next day to continue deliberations. And, given the overwhelming aggravating evidence in this case, a deliberation of more than one hour does not indicate that the jury was "anxious to go home". Given these facts, this Court finds that counsel acted properly. Moreover, Williams has produced no evidence to indicate that he was prejudiced.

Williams next alleges that counsel was ineffective for failing to object to the introduction of psychiatric and other expert testimony on future dangerousness by the Commonwealth. This allegation previously has been addressed, and this Court finds no reason to reconsider these findings. Specifically, this Court finds that Dr. Cantor and Dr. Ryans properly testified for the Commonwealth during the penalty phase of the trial. First, it is the report produced by the mental health expert that is protected by Virginia Code § 19.2-264.3:1. This Code section does not prevent a representative from the Commonwealth from contacting the mental health expert and interviewing him as he would any other witness. Second, it is clear from their testimony at trial that Dr. Ryans and

Dr. Cantor reached their conclusions on future dangerousness based upon Williams, criminal record, and not upon statements that Williams had made to them. (App. 677-678, 690-692). Moreover, the testimony of Drs. Cantor and Ryans, as well as the testimony of Dr. Mansheim at the suppression hearing, dealt with Williams' competency, an issue which is not protected under the statute. In any event, as stated previously, given the facts of this case, this Court finds no prejudice.

Williams' allegation that the use of prior convictions during the sentencing phase of trial violated the double jeopardy clause has no merit. As the Supreme Court of Virginia has found many times, the capital murder statutes allow the jury to use evidence of prior convictions to impose the sentence of death, and this does not violate the defendant's protection against double jeopardy. *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865 (1995).

Williams next claims that counsel was ineffective in failing to object to the Commonwealth's abuse of discretion in pursuing capital murder. This claim is conclusory, and there is no evidence to support it. It therefore fails for lack of any evidence.

In any event, this Court finds that a prosecutor has broad discretion in determining whether to prosecute for capital murder, *see, e.g., Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987), and that the Commonwealth's Attorney did not abuse that discretion. Counsel was correct in not objecting on this basis.

Finally, Williams asserts that counsel was ineffective for failing to object to improper argument by the Commonwealth's Attorney. This Court finds no merit to Williams' assertions. Moreover, to the extent that the underlying substantive claim was considered by the Supreme Court of Virginia on direct appeal, that issue has been decided, and counsel's failure to object is not prejudicial. *See Williams*, 234 Va. at 180-181, 360 S.E.2d at 368 369, (considering the penalty phase argument against the background of the entire case, "we find no prejudicial error in the trial court's failure to sustain the objection to the argument of the Commonwealth".)

As to the remainder of the Commonwealth's arguments, at both the guilt and penalty phases of the trial, this Court finds nothing improper in the Commonwealth's argument. In an attempt to show that the Commonwealth engaged in "misleading arguments", Williams has, himself, misrepresented the record. During his closing argument, the Commonwealth's Attorney stated that, "Jinnadean Stone testified that [the victim] did not have any heart problem. He had high blood pressure, but he didn't have any heart problem, he didn't have any chest pains". (App. 504-505). The Commonwealth's Attorney obviously was referring to the testimony of the victim's daughter wherein she testified that her father had high blood pressure four or five years ago, but had no chest pains or heart trouble. (App. 285-286).

The Commonwealth Attorney's reference during his opening statement that Williams "thought about getting a knife" was prefaced by the phrase, "we think the evidence will indicate . . . " (App. 161). Moreover, this was a fair representation of the statement made by Williams in

his confession. The Court finds, that the Commonwealth's Attorney's argument on remorse, and his reference to the testimony of Dr. Mansheim, were entirely proper. Finally, this Court finds that the remainder of the Commonwealth's argument was proper.

In any event, this Court can find no indication of actual prejudice stemming from any of these arguments in the record. Williams had pointed to none. Given these facts, the Court concludes that the argument of the Commonwealth's Attorney was proper and, in any event, Williams failed to show, based on this record, any prejudice.

H. Counsel was not ineffective during voir dire.

Williams alleges that his trial attorneys were ineffective in failing to conduct meaningful voir dire. Williams has failed to demonstrate, however, either how the voir dire was inadequate, or how he was prejudiced. This Court finds, first, that decisions made on voir dire are matters within the discretion and judgment of counsel, and are virtually are [sic] unchallengeable on habeas. Moreover, this Court finds that the jury was impartial, and Williams has failed to rebut that presumption. On these facts, the Court finds no merit to Williams' allegations.

I. Counsel was competent on appeal.

Williams contends that trial counsel failed to appeal the Commonwealth's introduction of psychiatric testimony on future dangerousness, the prosecution's

misconduct with regard to communication with and the introduction of testimony of psychiatric experts and the failure of the Court to provide sufficient money and resources to petitioner at the trial stage. This Court finds that the petitioner has failed to present any facts showing that counsel was ineffective in this regard. Counsel is not required to raise every issue on appeal. Indeed, counsel has the responsibility of "winnowing out weaker arguments on appeal and focusing on the one central issue if possible, or at most on a few key issues". *Jones v. Barnes*, 463 U.S. 745, 751, (1983). This Court finds that counsel exercised professional judgment in choosing the issues upon which to appeal. Moreover, Williams has demonstrated no prejudice as a result of counsel's failure to appeal any of the issues listed above.

Finally, to the extent that Williams alleges that counsel was ineffective on appeal of the Stroud case, that claim is not cognizable in this action.

J. Ineffective assistance claims related to the Stroud and Soloman cases.

Williams alleges that counsel was ineffective on the Stroud and Solomon cases. This Court finds that Williams has presented no credible evidence that counsel's performance in these cases was deficient. Moreover, he has presented no proof on the issue of prejudice. Accordingly, the Court finds that Williams has failed to carry his burden.

RECOMMENDED CONCLUSIONS OF LAW

I. Standard on Ineffective Assistance Claims

There can be no relief for ineffective assistance of counsel unless the petitioner shows that counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and petitioner shows prejudice in that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984) . Unless a petitioner shows ineffectiveness and prejudice, it cannot be said that a conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 692-697. The Courts of the Commonwealth follow the *Strickland* standard. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

Petitioner has the burden of showing that counsel's performance was deficient in "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. *Strickland*, 466 U.S. 687. This is a "reasonably effective assistance test." *Id.* In considering a claim of ineffective assistance, this Court need consider only what is constitutionally compelled, and not that which is merely prudent or appropriate. *Burger v. Kemp*, 483 U.S. 776, 794 (1984). Strategic choices made after a thorough investigation of the law and the facts, are virtually unchallengeable. *Strickland*, 466 U.S. at 690. And, a petitioner bears the burden of specifically identifying the acts or omissions of counsel that allegedly constituted ineffectiveness. *Id.*

Even if a Petitioner shows that counsel's performance was deficient, however, he must also show prejudice. Petitioner must show "that there is a reasonable probability that but for counsel's unprofessional errors, the result . . . would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Indeed, it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. The petitioner bears the 'highly demanding" and "heavy burden" in establishing actual prejudice. *Department of Corrections v. Jones*, 229 Va. 333, 329 S.E.2d 33 (1985).

This Court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. A claim of ineffective assistance must be proved by a preponderance of the evidence, *see Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983), and the burden of establishing ineffective assistance is upon the petitioner. *See Strickland*, 466 U.S. at 668. Moreover, this Court need not address both prongs if either fails. *Strickland*, 466 U.S. at 697.

II. Terry Williams was provided with effective and professional representation.

A. E. L. Motley suffered from no mental impairment during the course of his representation of Williams.

This Court has specifically found that E. L. Motley was under no mental impairment during the course of his

representation of petitioner. Counsel's performance was, indeed during all stages of the guilt phase "reasonably effective" under *Strickland,* and moreover, the petitioner has failed to show actual prejudice with regard to any of his ineffective assistance claims relating to guilt or innocence. As to petitioner's claim that the fees paid to counsel had an adverse effect on performance, petitioner has shown neither that counsel's performance was ineffective due to his fees, nor any prejudice resulting therefrom. Finally, given the fact that the Court has found that Mr. Motley was suffering from no mental impairment during the time of his representation of petitioner, the Court's rulings with regards to defaulted claims under *Slayton v. Parrigan* and *Hawks v. Cox* shall not be disturbed.

B. Counsel's performance at the guilt phase of the trial was both professional and competent.

1. *Counsel properly explored the mental competency of the petitioner.*

Petitioner was evaluated, first by Drs. Centor and Ryans, and then by Dr. Mansheim. All of these experts came to the conclusion that Williams was competent to plead and stand trial and did not lack the substantial capacity to understand the proceedings against him or to assist in his own defense. There was no evidence that Williams was suffering from any mental incompetency, including Fetal Alcohol Syndrome. Counsel has no affirmative duty to seek a second psychiatric opinion. *See Pruett v. Thompson,* 771 F. Supp. 1428 (E.D. Va. 1991). *See also Turner v. Bass,* 753 F.2d 342 (4 Cir. 1985), *vacated on other grounds, sub nom, Turner v. Murray,* 476 U.S. 28

(1986). Given the fact that three separate mental health professionals had determined that petitioner was competent, counsel was justified in not pursuing that avenue further. *Strickland*. Moreover, petitioner has failed to show that counsel's actions were prejudicial. His claim, therefore, must fail.

2. *Counsel adequately investigated the issues of robbery and cause of death.*

It is apparent from the record that counsel adequately investigated the facts of this case. Counsel interviewed numerous witnesses on the question of whether the victim may have had a previous injury. Based on the fact that all of the witnesses had significant "negatives", counsel made the tactical decision that it was best not to call these individuals at trial. *Strickland v. Washington*. Moreover, the confession given by petitioner prior to the autopsy being performed "dovetailed" with the autopsy report. Petitioner's account of robbing Mr. Stone of his wallet was also consistent with the physical finding at the crime scene. Given these facts, counsel acted reasonably under *Strickland*. Moreover, petitioner has shown no prejudice as a result of counsel's investigation. The best that petitioner has been able to do is to present speculative evidence that the victim may have fallen and injured himself, as well as speculative evidence that the victim may have *misplaced* his wallet. This speculation is insufficient to carry the burden under *Strickland*. For these reasons, petitioner's claim fails.

3. *Counsel was justified in relying on Dr. Oxley's conclusions.*

Petitioner's claim that counsel was ineffective for failing to request the appointment of a pathologist must fail. First, petitioner was not entitled to the services of a pathologist. *See O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2nd 491, 499, *cert. denied*, 488 U.S. 871 (1988) (there is no constitutional right to funding for defense forensic experts). Second, given the fact that petitioner's confession was consistent with Dr. Oxley's autopsy findings, there was no reason for counsel to continue to pursue this avenue. *Strickland v. Washington*. Moreover, petitioner has failed to show any prejudice under *Strickland*. Petitioner's claim must, therefore, fail.

4. *Williams' allegation of Fetal Alcohol Syndrome.*

As stated in its findings, this Court has found that it has not been clearly established that petitioner suffers from Fetal Alcohol Syndrome. Moreover, a layman such as Mr. Motley or Mr. Smitherman, would not have been aware of Fetal Alcohol Syndrome in 1986. As stated earlier, counsel was justified in relying on the reports of mental health experts. None of the experts, in 1986, stated anything about Fetal Alcohol Syndrome. Under these circumstances, petitioner has shown neither that counsel was ineffective, nor that he was prejudiced by counsel's actions. *Strickland v. Washington*. His claim must, therefore, fail.

5. *Counsel's conduct with regard to the confession and suppression hearing was competent and professional.*

The interview of petitioner was not coercive and he did not confess in the hopes of gaining some advantage or avoiding some evil in reference to the proceeding against him. *See Williams,* 234 Va. at 174, 360 S.E.2d at 365. This Court previously has rejected petitioner's contention that the police attempted to "coach" him during the course of his confession, and sees no reason to reverse its ruling. Any "discrepancies" within petitioner's confessions goes to the weight of the evidence, and not is [sic] admissibility. Counsel so argued, both at trial and on appeal. *See Williams,* 234 Va. at 174-175, 360 S.E.2d at 365. Petitioner was not entitled to an expert on "false confessions". The testimony of Dr. Mansheim at the suppression hearing posed no constitutional questions, even if his opinion was based on petitioner's statements, because those statements were given during a competency evaluation requested by petitioner. *See Payne v. Commonwealth,* 233 Va. 460, 357 S.E.2d 500, *cert. denied,* 108 S.Ct. 308 (1987).[9] Finally, this Court finds that there is no prejudice in the Commonwealth's use of Dr. Mansheim's testimony during the suppression hearing. *Strickland v. Washington.* Although at the time of his confession petitioner was represented by counsel, the rule in *Edwards v. Arizona,* 451 U.S. 477 (1981), is not implicated here. First, as noted, petitioner was represented by counsel on another matter.

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[9] Code of Va. § 19.2-264.3:1, cited by petitioner, deals with expert testimony during the penalty phase of trial, and is not relevant here.

Second, the Court finds as a matter of law that the petitioner initiated contact with the police by means of his letter. Finally, counsel was not ineffective for failing to seek a disqualification of the Commonwealth's Attorney.

As the underlying substantive claims have no merit, counsel cannot be said to have been ineffective under *Strickland*. Moreover, petitioner has shown no *Strickland* prejudice. His claim, therefore, must fail.

6. *There is no evidence that counsel failed to advise petitioner of his options.*

Williams has failed to present any evidence that counsel failed to advise him about his possible pleas or defenses. Under these circumstances, petitioner has failed to carry his burden in meeting either prong of the *Strickland* test.

C. Counsel's performance at the sentencing phase.

Petitioner has alleged ineffective representation of counsel, from beginning to end of his proceedings, however counsel's conduct and representation during the sentencing phase raises the most difficult issue in this case.

1. *Counsel's handling of mitigation evidence.*

Specifically, little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he

came from an alcoholic family; and that he was borderline mentally retarded. There also exist evidence that Petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities. Some of this testimony such as petitioner's wife, daughter and Bruce Elliott, was worthy of a jury's consideration on mitigation. However, none of this testimony was developed and presented at the sentencing phase of the trial.

At a capital murder sentencing, *any* evidence which might be favorable or mitigating can mean the difference between "life or death", mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice. The fact that it might be subject to cross-examination is far different than leaving out any good evidence which might be accepted by a single juror. Failure to present sympathetic testimony has been deemed to be ineffective assistance of counsel. *Kenley v. Armontrout*, 937 F.2d 1298, (8th Cir. 1991), *cert. denied*, 502 U.S. 964 (1991). In *Kubat v. Thieret*, 867 F.2d 351, it was held to be ineffective counsel not to call a deputy sheriff as a character witness since this probably would have been given weight by at least one member of the jury which is all that is needed.

Trial counsel's failure to investigate and develop the evidence available in this case bothers this court on the question of whether there was reasonable professional assistance of counsel which would (or could) have made a difference in the petitioner's sentence. The ABA standards for Criminal Justice provide that with regard to the

sentencing phase of a capital murder trial, a lawyer cannot rely on broad emotional appeals to the jury, nor can he rely on statements made by his client. Instead, it is necessary to conduct a thorough investigation regarding family relationships, educational background, mental and emotional stability, and the like. *See* ABA Standards for Criminal Justice, Standard 4-4.1, Commentary at 4-55 (2d Ed. 1980).

Counsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional competent assistance of counsel, and because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase. (*see Kubat v. Thieret*, supra.) ("Counsel may not treat the sentencing phase as nothing more than a mere post-script to the trial . . . Indeed, in some cases, this may be the stage of the proceedings in which counsel can do his or her client the most good.")

This Court believes this is the case here – Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough. For this reason, this Court would recommend the petitioner be granted a re-hearing on the sentencing phase of this trial.

2. *The testimony of Drs. Centor and Ryans was proper.*

Dr. Centor was appointed to submit a report and summary of his conclusions in accordance with Virginia

Code H 19.2-169.1(D), 19.2-169.5(D) and 19.2-264.3:1C. Dr. Ryans, while not specifically appointed by this Court, was a member of the evaluation team at Central State Hospital. Both Dr. Ryans and Dr. Centor testified for the Commonwealth at the penalty phase of the trial. Both Virginia Code §§ 19.2-169.5 and 19.2-264.3:1 provide that the report of the mental health professional shall be forwarded only to the attorney for the defendant and shall be deemed privilege. It is clear, from the plain language of the statute, that it is the *report* that is protected by the privilege. Nothing under either statute prohibits the Commonwealth's Attorney from calling such witnesses at trial. Moreover, where, as here, the opinion of future dangerousness was based on the defendant's criminal record, the testimony is admissible so long as the expert does not use "statements or disclosure" made to him by the defendant as part of the basis for forming his opinion on future dangerousness. Virginia Code § 19.2-264.3:1G; *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S.Ct. 143 (1993) Counsel's performance cannot be under *Strickland*, called into question for failure to object to the testimony of Drs. Ryans and Centor. Moreover, petitioner has failed to show any prejudice resulting from the testimony of these witnesses. *Strickland*.

Counsel also acted reasonably in not cross-examining Drs. Centor and Ryans on their previous report where they found that petitioner would not be a future danger. Had counsel done so, the Commonwealth would have pointed out on redirect that the initial report was completed before these witnesses were aware of petitioner's criminal history.

In any event, this Court finds that the evidence of petitioner's criminal history alone was more than sufficient to support a finding of future dangerousness. Thus, petitioner can show no prejudice, and his claim must fail.

3. *Counsel's decision not to object to the testimony of Dr. Mansheim was proper.*

As noted earlier, Dr. Mansheim's report was protected by statute. His testimony, however, was not. As was the case with Drs. Ryans and Centor, Mansheim's testimony was not based on statements made to him by petitioner.

Even if Dr. Mansheim's report had been erroneously provided to the Commonwealth, the report contained no information of substance on the issue of future dangerousness. Petitioner, therefore, can show no prejudice under *Strickland*.

Opening statements and closing argument are entirely a matter of trial strategy. *See e.g., Clozza v. Murray*, 913 F.2d 1092 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1123 (1991) (counsel's Opening and closing statements in capital murder case indicating hopelessness and disgust were consistent with trial strategy of maintaining credibility with jury). Counsel's performance, therefore, was competent under *Strickland*. Moreover, petitioner has alleged no prejudice, and has shown none, resulting from counsel's closing arguments.

E. The Jury was properly instructed.

The Court has stated in its findings that the jury was properly instructed. Counsel's performance, relative to instructions, therefore, was competent. Moreover, petitioner has failed to show any prejudice resulting from counsel's failure to request additional instructions. This is particularly true where, as here, petitioner has failed to proffer the instructions that he deeds [sic] appropriate.

F. Failure to raise objections.

This Court finds that counsel's performance in this area under *Strickland* was competent. In many instances cited by petitioner, counsel did, in fact, object to the testimony in question. In other instances, an objection, would have been inappropriate. Petitioner has failed to show, therefore, that counsel's performance was less than competent. Moreover, petitioner has failed to show any prejudice resulting from counsel's actions. His claim must, therefore, be dismissed.

G. Counsel was not ineffective during voir dire.

Petitioner has failed to show that counsel's actions during voir dire failed to meet the *Strickland* standard. Moreover, petitioner has failed to show any prejudice resulting from counsel's actions in this case. This claim must, therefore, be dismissed.

H. Counsel was effective on appeal.

Counsel is not required to raise every conceivable issue on appeal. Indeed, counsel has the responsibility of "winnowing out weaker arguments on appeal and focusing on the central issue, if possible, or at most, on a few key issues". *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Petitioner has not, therefore, shown that counsel was ineffective on appeal under the *Strickland* standard. Moreover, counsel has failed to allege, and has failed to show, that he was prejudiced by counsel's actions on appeal. His claim must, therefore, fail.

I. Counsel's performance in the Stroud and Solomon cases.

Counsel's performance in the Stroud and Solomon trials, was not deficient, nor has petitioner shown prejudice.

III. Procedurally Defaulted Claims.

A. The following claims are defaulted under the rule in *Slayton v. Parrigan*, 215 Va., 27, 205 S.E.2d 680 (1974)

I(A), I(C), II(A), II(B), II(C), III(C), VI, VIII(A), VIII(B), VIII(C), VIII(D), VIII(E), VIII(F), VIII(H), VIII(I), IX(A), IX(B), IX(C), IX(D), X, XII(A), XII(B), XIII, XIV, XV, XVI AND XVII[10]

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[10] By order of May 6, 1996, the Supreme Court of Virginia held that the following claims were defaulted under the rule in *Parrigan:* III(C), VIII(A), VIII(C), VIII(F), VIII(G), VIII(I) and XIII.

B. The following claims are defaulted under the rule in *Hawks v. Cox*, 211 Va. 95, 195 S.E.2d 271 (1970):

I(B), I(D), III(A), III(B), IV, V AND XI.

CONCLUSION:

The record of this case establishes that Terry Williams' trial attorneys rendered constitutionally effective assistance of counsel at all stages of the proceedings, save and except the sentencing phase, which did not measure up to the standard required under the holding of *Strickland v. Washington*, 466 U.S. 668 (1984), and that there is a reasonable probability that the result of the sentencing phase would have been different. As a result, it is recommended that the petition be given a re-hearing on the sentencing phase of his trial for capital murder.

Respectfully submitted,

/s/ James F. Ingram
James F. Ingram Judge

Terry WILLIAMS
v.
WARDEN OF THE MECKLENBURG CORRECTIONAL CENTER.

Record No. 960534.

Supreme Court of Virginia.

June 6, 1997.

Brian A. Powers (Francis J. Martorana; Ellen O. Boardman; Linda J. Tarlow; O'Donoghue & O'Donoghue, on brief), Washington, DC, for petitioner.

Robert Q. Harris, Assistant Attorney General (James S. Gilmore, III, Attorney General, on briefs), for respondent.

Present: All the Justices.

UPON A PETITION FOR A WRIT OF HABEAS CORPUS

COMPTON, Justice.

This is the first habeas corpus petition filed by a prisoner held under a sentence of death that we have addressed in a published opinion since the applicable statute was amended effective July 1, 1995. *See* Acts 1995, ch. 503.

The 1995 amendment to Code § 8.01-654 added subsection (C). It provides that this Court shall have "exclusive jurisdiction" to consider and award writs of habeas corpus with respect to any such petition filed by a convict held under a death sentence. § 8.01-654(C)(1). The amendment further provides that the circuit court "which entered the judgment order setting the sentence of death

shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court." *Id.*

The amendment fixes time limits within which the circuit court "shall conduct" a hearing on the issues enumerated in this Court's order and within which the circuit court "shall report its findings of fact and recommend conclusions of law to the Supreme Court." § 8.01-654(C)(3). Finally, the amendment provides that any objection to the circuit court's report must be filed in this Court, within a specified time limit. *Id.*

Petitioner Terry Williams was convicted in a jury trial in the Circuit Court of the City of Danville of the capital murder of Harris Thomas Stone. The crime was committed in November 1985, the accused was indicted in July 1986, and the jury found him guilty in September 1986.

After a separate proceeding on the issue of punishment and after hearing evidence of the accused's history, including aggravating factors and mitigating evidence, the jury fixed his sentence at death. This sentence was based upon the "future dangerousness" predicate of the statutory scheme; the verdict stated there is a probability that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society."

Following a statutorily mandated hearing before the trial judge on punishment, the defendant was sentenced in November 1986 to death. This Court affirmed the conviction and death sentence on direct appeal. *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987). The United States Supreme Court refused review. *Williams v.*

Virginia, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

In August 1988, the convict filed a habeas corpus petition in the Danville Circuit Court. After a 1989 hearing, the court dismissed a number of the habeas claims. An amended petition was filed in April 1995, and the court heard evidence in June 1995 on the issue of ineffective assistance of trial counsel.

On July 1, 1995, jurisdiction over the case was transferred to this Court pursuant to the changes in Code § 8.01-654. Subsequently, this Court directed the circuit court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel, as alleged in claim VII" of the amended petition. In June 1996, the circuit court heard argument of counsel on the ineffective assistance of counsel claim.

In August 1996, the circuit court forwarded its report to this Court and to counsel for the parties. The circuit court found that the accused's two trial counsel were effective in all but one stage of the trial proceedings. The circuit court concluded that trial counsel's failure to present certain mitigating evidence at the sentencing hearing before the jury warranted the granting of relief to the petitioner.

Both the petitioner and the respondent, J.D. Netherland, Warden of the Mecklenburg Correctional Center, filed objections to the circuit court's rulings. In a January 1997 order, this Court ordered briefing and argument on the issue that the circuit court had found warranted

relief. Petitioner's objections to the circuit court's findings recommending dismissal of all the other claims for relief were overruled.

The evidence presented in the 1986 criminal trial established the following basic facts. The victim, an elderly man, was found dead at 2:00 a.m. lying in a bed at his Danville home. He was fully clothed and there was no sign of a struggle. The victim's wallet, customarily kept fastened in his trouser pocket, was missing.

Later, the accused made several confessions to the murder and robbery of the victim. The defendant said he had struck the victim on the chest, and later on the back, with a mattock and had removed three dollars from the victim's wallet. The victim died from the blows, which fractured two ribs and displaced them inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

During the penalty phase of the trial, the prosecution presented evidence of the 31-year-old accused's extensive criminal record, beginning when he was 11 years old. This included a robbery in 1976, a burglary involving an assault upon the victim in 1982, and a vicious and brutal malicious wounding of an elderly woman in March 1986 that caused brain damage and left her a "vegetable." In addition, there was evidence of a December 1985 assault by the accused upon an elderly man while the accused was committing arson of the victim's home. Two forensic psychological experts who examined the accused testified there was a high probability that he would commit future criminal acts of violence and that he constituted a continuing threat to society.

The accused's mother testified that he was never violent at home and that she did not believe he was a threat to others. A female acquaintance of the accused who had known him for 11 years testified he was never violent in her presence. Another witness, whose foster daughter had dated the accused, testified he was not a violent person.

Based on the June 1995 habeas evidentiary hearing and the subsequent argument of counsel, the circuit judge, who had presided at the trial, made a number of "findings of fact" and "recommended conclusions of law." The court found that the convict's "trial attorneys were both experienced in criminal defense work and thoroughly prepared the case in defense of capital murder." In this connection, the court concluded that counsel's "performance at the guilt phase of the trial was both professional and competent."

Elaborating, the court stated that counsel "properly explored the mental competency of" the accused, who, according to the evidence at trial, had a "borderline level of intellectual functioning." Also, the circuit court found that trial counsel "adequately investigated the issues of robbery and cause of death"; that counsel "was justified in relying on" the conclusions of the medical examiner regarding the cause of death; that counsel's "conduct with regard to the confession and suppression hearing was competent and professional"; and that they were not ineffective for their failure to investigate whether the accused suffered from a so-called "Fetal Alcohol Syndrome." Further, the court concluded that counsel performed adequately regarding voir dire, evidentiary objections, and jury instructions.

Additionally, the circuit court found that the performance of defense counsel, in the main, during the penalty phase proceedings did not warrant habeas relief. And, the court determined counsel was effective on appeal.

The court reported, however, that certain actions of counsel during the trial's penalty phase were "the only real concern." "Specifically," the court said, "little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded."

Continuing, the court said there also exists "evidence that petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities." The court was of the view that some of this testimony "such as [from] petitioner's wife, daughter and Bruce Elliott, was worthy of a jury's consideration on mitigation. However, none of this testimony was developed and presented at the sentencing phase of the trial."

The court stated: "Probably the most persuasive mitigating evidence which was not tendered to the jury involved the failure to interview and call Bruce Elliott as a witness during the sentencing phase." Elliott, a certified public accountant, contacted defense counsel prior to trial and offered his help, but, according to the court, "counsel never followed up by talking to the witness." The court found that Elliott had known the accused since 1978 and would have portrayed the accused "as a decent human

being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially." Elliott, who did not testify at the habeas hearing, stated in an affidavit that the accused "took pride in his achievements," such as graduation from carpentry school while incarcerated in a correctional facility.

The court found that trial counsel "made a tactical decision to focus attention at the penalty phase" on the accused's confession, which was unsolicited and volunteered. Counsel's strategy, the court concluded, was to convince the jury that the accused's life should be spared, and that he should be given a life sentence, because of the unsolicited confession.

Also, the court said that counsel "made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth from reminding the jury of the 'horrible and terrible crimes' " committed by the accused. Nevertheless, the court said, "it is troubling . . . that favorable evidence was not pursued and introduced for 'whatever it was worth' when the decision which was to be made by the jury involved life or death."

Summarizing, the court opined that at "a capital murder sentencing, any evidence which might be favorable or mitigating can mean the difference between 'life or death.' " Continuing, the court stated that "mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice." In addition, the court said that a failure "to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable, professional

competent assistance of counsel, and because this evidence is so crucial to the outcome of the jury's ultimate decision of life or death, it is prejudicial to a defendant when it is not presented at the sentencing phase." This is such a case, according to the court, because "Terry Williams needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough."

Therefore, the court recommended that a writ of habeas corpus be granted and that the convict be granted a rehearing on the sentencing phase of his trial.

The right to counsel, guaranteed by the Sixth Amendment to the Federal Constitution and made applicable to the states through the Fourteenth Amendment, includes the right to effective assistance of counsel. *Murray v. Griffith*, 243 Va. 384, 388, 416 S.E.2d 219, 220 (1992) (citing *Virginia Dep't of Corrections v. Clark*, 227 Va. 525, 533, 318 S.E.2d 399, 403 (1984)). This constitutional guarantee "includes the right to the care and skill which a reasonably competent attorney would exercise for similar services under the circumstances." *Stokes v. Warden*, 226 Va. 111, 116-17, 306 S.E.2d 882, 884 (1983). In other words, the accused is entitled to counsel who is a reasonably competent attorney and to advice that is within the range of competence demanded of attorneys in criminal cases. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In a collateral attack on a conviction, however, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes*, 226 Va. at 118, 306 S.E.2d at 885.

Accord Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; *Murray*, 243 Va. at 388, 416 S.E.2d at 221. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. at 2066.

In sum, *Strickland* requires a prisoner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. And, in determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695, 104 S.Ct. at 2068-69. *Accord Strickler v. Murray*, 249 Va. 120, 128, 452 S.E.2d 648, 652, *cert. denied*, 516 U.S. 850, 116 S.Ct. 146, 133 L.Ed.2d 92 (1995).

"As is obvious, *Strickland's* standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986). *Accord Strickler*, 249 Va. at 128, 452 S.E.2d at 652. Moreover, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). And, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to

which the law does not entitle him." *Id.* at 369-70, 113 S.Ct. at 842-43.

Further, we have adopted the *Strickland* suggestion, 466 U.S. at 697, 104 S.Ct. at 2069-70, that if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickler*, 249 Va. at 128, 452 S.E.2d at 652. We shall employ that procedure in the present case.

This brings us to a determination of the standard of review that we shall apply to the circuit court's findings of fact and conclusions of law. We hold that, under the 1995 amendment to Code § 8.01-654, the issue whether a prisoner held under a death sentence is entitled to habeas relief is a mixed question of law and fact. Therefore, a circuit court's finding and conclusion on the issue is not conclusive and binding upon this Court but is properly subject to judicial review. *See The Stenrich Group v. Jemmott*, 251 Va. 186, 192, 467 S.E.2d 795, 798 (1996). Indeed, this is the standard of review employed in similar cases in the federal system. The Supreme Court has said "that both the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law" and that "a state court's ultimate conclusions regarding competence and prejudice are not findings of fact binding on the federal court." *Kimmelman*, 477 U.S. at 388-89, 106 S.Ct. at 2590 (citing *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070).

In the present case, the factual part of the mixed question is whether there was evidence in mitigation that was available but not presented at the criminal trial. There is no doubt there was such evidence; the facts

really are not in dispute. The legal part of the mixed question is whether this deficient performance constitutes "prejudice" within the meaning of that term as defined by the decided cases. In resolving this part of the question, the crucial inquiry is whether the circuit court correctly applied the law to the established facts. We hold that it did not.

In his brief filed in this Court in support of the circuit court's conclusions, the prisoner dwells upon the facts relating to the performance prong of the *Strickland* test, and has comparatively little to say about circumstances relating to the prejudice prong. He says there is "no merit" to the respondent's contention "that presentation of any additional witnesses would have done Petitioner more harm than good as each new witness would only give the prosecutor a renewed opportunity to hammer home the details of Petitioner's checkered criminal past."

Reverting to a discussion of performance in a prejudice section of his brief, the prisoner states: "In any event, even if counsel had sought to discover [available mitigation evidence of which counsel was ignorant], fear of 'opening the door' with each witness – to a repetition of Petitioner's criminal history – is not a reasoned decision given the facts of this case." Continuing, he argues that the prosecutor's "relentless recitation of Petitioner's bad acts had already been detailed for the jury through twelve different witnesses before Petitioner's counsel even stepped up to the plate. Any door that trial counsel feared would be opened by the presentation of additional mitigation witnesses had already been swung wide with gusto," and no amount of vigorous cross-examination by the prosecutor "could have left the jury feeling any worse

about Petitioner than they had at the conclusion of the prosecutor's case."

The prisoner argues there "is a 'reasonable probability' that at least one juror would have been moved to spare Petitioner's life had he heard" the mitigation evidence developed at the habeas hearing that was not presented at the trial. Summarizing, he contends there "is a 'reasonable probability' that had at least one juror heard any of this evidence – let alone all of this evidence – the outcome of this case would have been different."

We reject these contentions. The prisoner's discussion flies in the face of the Supreme Court's admonition in Lockhart, supra, that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."

We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused.

The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.

The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.

Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.

While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, 104 S.Ct. at 2070, the predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates.

What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700, 104 S.Ct. at 2071. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Unfortunately, the circuit court appears to have adopted a per se approach to the prejudice element. The court opined that "any evidence which might be favorable or mitigating can mean the difference between 'life

or death' "; that "mitigating testimony is absolutely crucial and if none is offered, this amounts to prejudice"; and that the accused "needed anything and everything that might be available as favorable evidence to persuade the jury to save his life. Anything less was not enough." This demonstrates an emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable.

In conclusion, employing the language of *Strickland*, the prisoner "has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [The prisoner's] sentencing proceeding was not fundamentally unfair." 466 U.S. at 700, 104 S.Ct. at 2071.

Accordingly, the petition for a writ of habeas corpus, as amended, will be denied.

Writ denied.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TERRY WILLIAMS, Petitioner,	)	
v.	)	CIVIL ACTION NO. 97-1527-A
SAM PRUETT, WARDEN MECKLENBURG CORRECTIONAL CTR. Respondent.	)	

ORDER

For the reasons set forth in the attached Memorandum Opinion, it is hereby ORDERED that:

(1) the petition for habeas corpus, to the extent it challenges the legality of the sentencing procedure pursuant to which petitioner was sentenced to death on November 19, 1986 by the Circuit Court, City of Danville, Virginia, is GRANTED;

(2) the said sentence of death is vacated;

(3) Petitioner shall be resentenced in the Circuit Court, City of Danville, Virginia, within a reasonable time, pursuant to Virginia Code § 19.2-264.3(C);

(4) Petitioner's Motion to Compel Discovery, to Transfer Petitioner, and to Provide Funds for the Retention of Certain Experts is DENIED;

(4) the Clerk of the Court shall forward copies of this Order and Memorandum Opinion to all counsel of record.

/s/ James C. Cacheris
United States District Judge

April 7th, 1998
Alexandria, VA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TERRY WILLIAMS, Petitioner,	)	
v.	)	
SAM PRUETT, WARDEN, MECKLENBURG CORRECTIONAL CENTER, Respondent.	)	CIVIL NO. 97-1527-A

MEMORANDUM OPINION

This matter comes before the Court on Terry Williams' ("Williams" or "Petitioner") Petition for a Writ of Habeas Corpus For the reasons set forth below, Williams' Petition is GRANTED in part and DENIED in part.

Facts.

Williams was indicated on July 7, 1986, for the capital murder of Harris Thomas Stone ("Stone") on November 2, 1985, while in the commission of the armed robbery of Stone in violation of Virginia Code section 18.2-31(d). A second count of the indictment charged Williams with the robbery of Stone during the course of the capital murder.

On September 30, 1986, a jury found Williams guilty of both charges, fixing his punishment for robbery at seven years imprisonment. In a separate proceeding mandated by Virginia Code section 19.2-264.4, after hearing

evidence of Williams' history, including aggravating factors and mitigating evidence, the jury fixed Williams' sentence at death, based on his future dangerousness." After considering the probation officer's report and other evidence in a further hearing, the trial court, by its order dated November 19, 1986, sentenced Williams to death for capital murder. The Supreme Court of Virginia affirmed his conviction on September 4, 1987, *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987), and the United States Supreme Court denied review. *Williams v. Virginia*, 484 U.S. 1020 (1988).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. The court dismissed some claims as procedurally barred by Order of April 4, 1990. An amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

On July 1, 1995, jurisdiction over the case was transferred to the Virginia Supreme Court pursuant to the changes in Virginia Code section 8.01-654. By order of May 6, 1996, the Supreme Court directed the lower court to "report its findings of fact and conclusions of law regarding the issue of ineffective assistance of counsel," pursuant to section 8.01-654(C)(3). The May 6 order also ruled several of Williams' claims defaulted.

The circuit court filed its order and Findings of Fact and Recommended Conclusions of Law, dated August 15, 1996, finding that trial counsel were effective in all circumstances of the trial but one: the circuit court concluded that trial counsel's failure to present mitigating

evidence at sentencing warranted the granting of relief. Both Williams and the respondent filed objections to the circuit court's findings. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the issue that the lower court found warranted relief. The Supreme Court accepted the circuit court's findings recommending dismissal of all other claims, overruling Williams' objections.

On June 16, 1997, the Supreme Court by unanimous opinion rejected the circuit court's recommendation for relief, and denied the relief. *Williams v. Warden,* 254 Va. 16, 487 S.E.2d 194 (1997).

Following the denial of Williams' petition for rehearing on August 1, 1997, the Danville Circuit Court set an execution date of October 7, 1997. By Order of September 29, 1997, this Court stayed Williams' execution and appointed counsel for this action.

The facts underlying Williams' conviction and sentence are set forth in the Virginia Supreme Court's opinion denying his direct appeal. *See* 360 S.E. 361. They will be set forth below only to the extent required by the issues properly before this Court.

I. Present Claims.

Williams presents for consideration nineteen claims[1] based on his allegations that:

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[1] The numbered claims are as follows:

Claim I(A)(1): Motley's Mental Disability Rendered Him Constitutionally Ineffective;

(1) Trial counsel provided ineffective assistance;

Claim I(A)(2): Limitations on the payment of court-appointed counsel deprived indigent Petitioner of effective assistance of counsel;

Claim I(B)(1): Trial counsel failed to investigate, prepare or present mitigation evidence for the jury's consideration;

Claim I(B)(2): Trial counsel unreasonably failed to exercise Petitioner's right to bar the testimony of Centor and Ryans at the sentencing hearing;

Claim I(B)(3): Having unreasonably failed to exclude the testimony of Centor and Ryans, defense counsel unreasonably failed to cross-examine them in any meaningful way;

Claim I(B)(4)(a): Trial counsel unreasonably failed to appreciate that they had no experts to assist the defense and thus unreasonably failed to take corrective measures/ with regards to the Appointment of mental health experts;

Claim I(B)(4)(b): Trial counsel unreasonably failed to appreciate that they had no experts to assist the defense and thus unreasonably failed to take corrective measures/ with regards to the fact that Mental health experts did not conduct themselves as defense experts in violation of *Ake*;

Claim I(B)(5): Trial counsel was ineffective in focusing on the "horrible" nature of the crime rather than on mitigating factors;

Claim I(B)(6): Trial counsel failed to request jury instructions on the meaning and role of mitigation evidence;

Claim II(A): Failure to Prove Cause of Death;

Claim II(B): Failure to Prove the Robbery;

Claim III: Admission of Petitioner's Statements to Police was Improper and Prejudicial;

Claim IV: Evidence at Sentencing Concerning the Stroud Conviction and the Solomon Incident was Unduly Prejudicial;

(2) Insufficient evidence was presented of the cause of death and also to support his robbery conviction, both of which served as the necessary predicates for his capital sentence;

(3) Admission of his statements to police was improper and prejudicial;

(4) Evidence at sentencing concerning the *Stroud* trial and the *Solomon* case was unduly prejudicial;

(5) The death sentence was based upon improper allegations that he was not remorseful because he exercised his constitutional right to plead not guilty;

(6) The trial court erred in sustaining the prosecution's objection to defense counsel's discussion of the meaning of a life sentence;

(7) Imposition of the death penalty in Virginia is arbitrary because of the failure of the

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Claim V: The Death Sentence Was Based upon Improper Allegations that Petitioner Was Not Remorseful Because He Exercised His Constitutional Right to Plead Not Guilty;

Claim VI: The Trial Court Erred in Sustaining the Prosecution's Objection to Defense Counsel's Argument on the Meaning of a Life Sentence;

Claim VII: Imposition of the Death Penalty Was Arbitrary Because of the Virginia Supreme Court's Failure to Engage in Meaningful or Fair Appellate Review;

Claim VIII: Future Dangerousness Prong of Death Penalty Statute is Unconstitutionally Vague;

Claim IX: Virginia's Death Penalty Law Is Unconstitutional Because It Has Been Applied in a Discriminatory Manner;

Claim X: Imposition of the Death Penalty Is Unconstitutional Cruel and Unusual Punishment.

Supreme Court of Virginia to engage in meaningful or fair appellate review;

(8) "Future Dangerousness" factor in death penalty statute is unconstitutionally vague;

(9) The Virginia death penalty statute is unconstitutional because it has been applied in a discriminatory manner;

[and]

(10) Imposition of the death penalty violates the Eighth and Fourteenth Amendments since it constitutes cruel and unusual punishment.

II. Procedural Posture.

It is beyond contention that passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act") fundamentally altered the role of federal district courts reviewing petitions for habeas corpus brought by prisoners in state custody. According to the Fourth Circuit, the Act "abrogates the independence with which federal courts have reviewed habeas corpus claims since *Brown v. Allen*, 344 U.S. 443, 458 (1953)." *Mackall v. Murray*, 109 F.3d 957, 959 (4th Cir. 1997).

The Act essentially divides prisoner claims between those that were raised and addressed on their merits in state courts and those raised for the first time in federal court. However, the new procedural default provisions dealing with this second species of claim apply only to prisoners held in states that have "opted in" by providing certain minimum procedural and substantive protections to defendants. While the Fourth Circuit has avoided ruling on whether Virginia is an "opt in" state, the Court is

guided by the prevailing opinion of the district courts that have confronted the issue and held that Virginia is not an "opt in" state. *See Breard v. Netherland*, 949 F. Supp. 1255 (E.D.Va. 1996); *Wright v. Angelone*, 944 F. Supp. 460 (E.D.Va. 1996); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D.Va. 1996). Accordingly, Williams' claims will be judged as defaulted or not according to the standards applicable prior to AEDPA's enactment.

A. Claims that are procedurally barred.

In *Smith v. Murray*, the United States Supreme Court held that federal courts reviewing habeas corpus petitions must apply state rules governing procedural default "unless the defendant succeeds in showing both 'cause' for non-compliance with the state rule and 'actual prejudice resulting from the alleged constitutional violation.' " 477 U.S. 527, 533 (1986); *Barnes v. Thompson*, 58 F.3d 971, 974 (4th Cir. 1995). In cases arising under Virginia law, "failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding." *Smith*, 477 U.S. at 533 (citing *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974)).

In *Gray v. Netherland*, the Supreme Court held that the Virginia rule barring consideration of "any allegation the facts of which the petitioner had knowledge at the time of filing any previous petition" served as adequate and independent state grounds for denying relief and prohibited federal courts from considering such claims absent cause and prejudice. 116 S.Ct. 2074, 2081 (1996) (citing Va. Code § 8.01-654(B)(2) (1992)).

Defining what constitutes valid cause depends on the specific posture and facts of each case. The Supreme Court held in *Smith* that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Smith*, 477 U.S. at 535 (quotations and citations omitted). *See also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997). Instead, Petitioner must show an "external impediment preventing his counsel from constructing or raising the [omitted] claim." *Murphy*, 116 F.3d at 100 (citation omitted); *Barnes v. Thompson*, 58 F.3d at 974 (citing *Clayton v. Muncey*, 845 F.2d 1238, 1241 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988)). The *Smith* Court went on to conclude that counsel's process of winnowing out weaker claims and focusing on those perceived to be stronger rarely violates the standards for effective representation set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Regarding claims that a prisoner failed to bring on state habeas, the Fourth Circuit has held that a petitioner has "no right to counsel (effective or otherwise) on state habeas, and cannot claim ineffective assistance of state habeas counsel, or claim that counsel's errors were cause for procedural default." *Smith v. Angelone*, 111 F.3d 1126, 1133 (4th Cir. 1997). *Mackall*, handed down less than one month before *Smith*, seems to carve out a narrow exception to *Smith's* rule for claims that may only be brought for the first time on state habeas. *Mackall*, 109 F.3d at 963.

B. Claims not procedurally barred by state courts.

If a state court did address an issue's merits "the Act permits federal habeas corpus review only if the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or 'was based on an unreasonable determination of the facts.' *Id.* § 2254(d)." *Mackall*, 109 F.3d at 959.

Under section 2254,

> [i]f the applicant has failed to develop the factual basis for a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that
>
> (A) the claim relies on
>
> • • •
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

C. The Posture of this Case.

These standards require the Court to initially sort out which claims have been defaulted, which were addressed on their merits by the state courts, and which require additional factual development in this Court. On direct

appeal, Williams failed to raise any of his present claims except those addressing: the voluntariness of his confession; insufficient evidence of the cause of death and of the robbery; admission of evidence concerning the *Stroud* trial; and the trial court's refusal at the penalty stage to allow argument regarding the meaning of a life sentence. Addressing these claims, the Virginia Supreme Court ruled that Williams' confession was voluntary. The Court concluded also that the corpus delicti was adequately established both as to the robbery and the cause of death. The Virginia Supreme Court ruled that Williams was not entitled to argue the meaning of a life sentence to the jury in the penalty phase of the trial. Finally, the Court ruled that the Commonwealth was entitled to present evidence of the malicious wounding of an elderly woman by Williams during the penalty phase of the trial. *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1995).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. The court dismissed some claims as procedurally barred by order of April 4, 1990. An amended Petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

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On June 16, 1997, the Supreme Court by unanimous opinion rejected the circuit court's recommendation for relief, and denied the relief. *Williams v. Warden*, 254 Va. 16, 487 S.E.2d 194 (1997).

III.

Defaulted Claims Requiring a Showing of Cause and Prejudice Before They May Be Considered.

The following claims either were never raised in state court or were raised and found defaulted under *Slayton v. Parrigan* by the Virginia Supreme Court: Petitioner's Claims I(B)(4)(a), I(B)(4)(b), IV (in part, relevant to the Solomon evidence), VII, VIII, IX, and X. Petitioner has failed to demonstrate both "cause for non-compliance with the state rules governing procedural default" and "actual prejudice resulting from the alleged constitutional

violation." Accordingly, these claims are defaulted and will not be reviewed by the Court.[2]

IV.

Claims Addressed on their Merits by Virginia Courts

A. Ineffective Assistance of Counsel

In order to succeed on a claim of ineffective assistance of counsel, Petitioner must show (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). In this context, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Finally, counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

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[2] The Court notes that is has considered Petitioner's claims that defense counsel was constitutionally ineffective in failing to make objections, preserve errors and raise issues on appeal so as to avoid procedural defaults, and that defense counsel were constitutionally ineffective in their appeal of this case. The Court finds these arguments are without merit. *See, e.g., Pannier v. Murray*, 964 F.2d 1404, 1423 (4th Cir. 1992) ("with the benefit of hindsight, rarely can it be said that trial counsel made every possible objection and raised every conceivably viable argument. The law, however, requires not perfect but only professionally reasonable performance of counsel."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (appellate counsel has responsibility to winnow out weaker arguments and focus on central issue).

unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*

"[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* at 698. What historically happened is a question of fact, and this Court will grant habeas relief only if the decision of the Supreme Court of Virginia "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Whether what happened constitutes ineffectiveness is a question of law, and this Court will grant habeas relief if the Supreme Court of Virginia's decision "was contrary to, or involved an unreasonable application of, clearly established federal law." *Id.*

1. Motley's alleged mental impairment during trial[3]

As noted above, Petitioner filed for a writ of habeas corpus in the Circuit Court of the City of Danville on August 26, 1988. On August 26, 1988, the court held argument and dismissed numerous claims. On or about April 24, 1995, the Petitioner filed an amended petition for a writ of habeas corpus, again in the circuit court. On June 15 and 16, 1995, the circuit court held an evidentiary hearing on the issues of ineffective assistance of counsel. On July 1, 1995, however, the circuit court lost jurisdiction over the case, pursuant to Virginia Code § 8.01-654, and transferred the case to the Supreme Court of Virginia.

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[3] Petitioner's Claim I(A)(1).

On May 6, 1996, the Supreme Court of Virginia entered an order directing the circuit court to "report its findings of fact and recommend conclusions of law regarding the issue of ineffective assistance of counsel." On June 24, 1996, the circuit court again heard arguments from counsel on the issue of the ineffective assistance of counsel claim.

Judge Ingram made the following initial findings of fact regarding Williams' trial counsel, E.L. Motley, Jr.'s, mental state during the trial:

> Petitioner alleges that he was denied his Sixth Amendment right to counsel because E. L. Motley, Jr. was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically, Motley did not begin to have problems related to his depression until the late spring or early summer of 1987. Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.
>
> It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

> During the two years that he knew Motley, Smitherman never noticed anything unusual about Motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams.
>
> Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E. L. Motley was acting under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is based on the mental problems suffered by Mr. Motley, such claims lack merit.
>
> In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

Williams v. Netherland, No. LP88-81 at 5-7 (Danville Cir. Ct. Aug. 15, 1996) (hereinafter "Findings").

Petitioner argues that these findings are "an unreasonable determination of the facts in light of the evidence presented." In support of his contention, Petitioner points to certain testimony elicited during the two-day hearing on the ineffective assistance. Petitioner notes that Motley himself testified that his depression had been ongoing for years before "things started spinning out of control," and that Motley further conceded that his depression was something even he couldn't "put a finite beginning or ending date on." Petitioner points out that Motley himself conceded that it was his depression that ultimately

rendered him incapable of practicing law such that, after a series of bar complaints and reprimands, he was forced to surrender his license in 1989.

Judge Ingram's findings are not "an unreasonable determination of the facts in light of the evidence presented." The Court notes Mr. Motley's testimony during the two-day hearing before Judge Ingram:

> Q Well let me just see if I understand this, Mr. Motley. Are you saying that you were depressed and unable to attend to details when it came to civil matters, but you had no problem when it came to criminal matters?
>
> A Generally I was able to handle criminal matters all right.
>
> Q So you were able to compartmentalize your depression in that respect?
>
> A . . . Some things I could do fine. I was able to get my criminal work done, was able to get my bankruptcy work done, but other things at the office slid, yes, and that is what I had problems with.

Transcript of state Habeas Corpus Evidentiary Hearing at 46-48 (hereinafter "Hearing Transcript").

The Court has carefully examined the transcript of the State Habeas Corpus Evidentiary Hearing and finds that the testimony supports Judge Ingram's findings that Mr. Motley's work was not adversely affected by his depression until after the conclusion of William's trial and appeal, and also that Mr. Motley was able to handle his criminal work throughout his bouts with depression. The Court also notes that Judge Ingram presided over the

Williams trial and thus is in the unique position of being able to judge Motley's performance during trial.

2. Compensation of court-appointed defense counsel[4]

Petitioner claims that the circuit court's finding that there is "no nexus" between the lack of compensation and trial counsel's performance is unreasonable in light of the evidence presented in state court. Petitioner cites Motley's testimony that he asked the circuit court to appoint a private investigator to assist him, but the motion was denied. Motley was unable to pursue his need for his professional assistance any further because "[n]either Mr. Smitherman nor [Motley] had the resources to hire a private investigator" and neither Williams nor his family had the money to pay for such services. Hearing Transcript at 69. Petitioner also cites Smitherman's testimony that no thought was given to obtaining a pathologist, notwithstanding that the cause of death was a critical issue in this case and had variously been determined to be natural causes, then alcohol poisoning, then a compressed lung, because "we didn't have any money" and he and Motley "didn't know that the Court could even appoint a pathologist." Hearing Transcript at 151.

The circuit court's findings were not based on an unreasonable determination of the facts. The fact that Petitioner was denied the services of a private investigator certainly does not amount to ineffective assistance of counsel. Petitioner has not demonstrated that the lack of

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[4] Petitioner's Claim I(A)(2)

money was the cause for counsel's failure to obtain testimony of their own expert pathologist.[5]

3. Mitigation Evidence[6]

After the conclusion of the hearing regarding ineffective assistance of counsel in the Danville Circuit Court, Judge Ingram entered certain findings of fact and conclusions of law regarding Williams' habeas petition. He found all of Petitioner's claims to be without merit, except for trial counsel's performance during the penalty phase. "Specifically, little evidence was presented on the issue of mitigation, and there exists evidence that petitioner had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded." Judge Ingram also noted that there was evidence that "petitioner's conduct had been good in certain settings in his life (such as when he was incarcerated) and there were friends, neighbors and family of petitioner who would have testified that he had redeeming qualities." None of this testimony was developed and presented at the penalty phase of the trial. Judge Ingram found that "[w]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment." Findings at

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[5] Petitioner maintains a separate claim of ineffective assistance of counsel based an counsel's failure to hire an expert pathologist. This claim is addressed separately, below.

[6] Petitioner's Claim I(B)(1).

21. The Judge then recommended that the Petitioner be granted a re-hearing on the sentencing phase of the trial. The Virginia Supreme Court did not accept the circuit court's recommendation, and held that defense counsel's failure to discover and present certain mitigating evidence during the penalty phase did not result in prejudice amounting to ineffective assistance of counsel, as would warrant habeas relief.

a. Performance

The Virginia Supreme Court disposed of Williams' ineffectiveness claim on the ground that sufficient prejudice did not result from counsel's failure to introduce certain mitigating evidence. The Virginia Supreme Court, thus, did not address the question of whether counsel's performance fell below the range of competence demanded of lawyers in criminal cases.

It is important and relevant to both the performance and the prejudice prongs of the *Strickland* test, to set forth in some detail the mitigating evidence, which counsel either failed to investigate, or did investigate but decided not to introduce during the sentencing hearing.

(i) Counsel did not introduce evidence of the Petitioner's background. Some detail is necessary here, because Petitioner's childhood was particularly troubled. It is clear that Petitioner was not providcd with basic necessities from a very early age. Petitioner's record obtained from the Danville Juvenile Court contains information filed after an investigation of Williams' home, when Williams was one year old. An officer from the Danville Police Department was sent to the Williams

home, after the Department received a notice that the parents were on the front porch, and were "in such a state that they could not talk plain" and that the five children inside were passed out from drinking "some intoxicating beverage." The following report was filed:

> Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible for them to get up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah, Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes, but was covered with a sheet.
>
> The home was a complete wreck. There were several men and one woman visiting in the home. . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered all over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. The only food in the house was a pan of corn-bread, and this looked as if someone had been playing in it and had scattered it all over the floor. The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front be room [sic].

> Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.
>
> The next day, Oliver [Olivia] said that her faher had sent Ohair out in the back yard to get a bottle of whiskey. He brought it in the house and said Ohair passed the bottle around to the children, while their mother and father watched them. Ohair said they had drunk whiskey before.

Pre-Hearing Investigation, Danville Juvenile Court, File #1341 at 17-18. Petitioner's juvenile records state that Williams was placed in a Court Boarding House and committed to the Danville Social Service Bureau for approximately two years before he was returned to the custody of his parents. *Id.* at 17. The report also lists several juvenile offenses, such as "breaking and entering the home of Susan Clark and the larceny of one box of doughnuts, one package of luncheon meat and twenty-five pennies," and pulling a fire-alarm. *Id.* at 20. The report contains information regarding Petitioner's parents. *Id.* It reveals that Petitioner's father was generally known as a "bootlegger." *Id.* The report also states that the father seemed to care about his children, but was limited by the fact that the family was so large (eleven children, ten between the ages of three and eighteen). *Id.*

The father was unable to secure adequate employment due to his limited education, and did not ask for public assistance. *Id.* The report reveals that Petitioner's mother had a tumor but could not afford an operation. *Id.* The report also comments on Petitioner's health: "Terry had a fall in 1965 and according to his mother he has not acted right since. He fell on the back of his head and a large place there. . . . [S]he still thinks that it affected his mind and in [her] words she states, 'He needs a head doctor.' " *Id.* at 21.

(ii) Counsel did not introduce evidence that Petitioner was abused by his father.

(iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's missing wallet.

(iv) Several character witnesses were not called to testify. Petitioner's wife and ten-year-old daughter, who had attended the entire trial and were willing to testify, were not called as character witnesses. Both would have testified that Williams was a good and loving father. Another potential witness, Bruce Elliott, was not a family member. The trial judge found that the testimony of Elliott, a respected CPA in the community, could have been quite important to the jury: "His testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially. . . . This testimony from a well-educated

professional would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." Findings at 20.

(v) Finally, counsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial.

At the sentencing phase four witnesses were called for the defense, Dr. Mansheim, Ms. Moore (a woman whose foster daughter had dated Williams), Deborah Grant (a female acquaintance of Williams who had known him for eleven years), and Williams' mother. Trial Transcript at 639-661. Dr. Mansheim testified very briefly and told the jury that Williams had related a story to him that, during a robbery, Williams removed the bullets from a gun so that no one would get hurt. The other three character witnesses testified that Williams was not a threat to others and was not a violent person. The testimony of all four witnesses covers approximately twenty pages of the transcript, and does not mention anything about petitioner's childhood, mental ability, or anything else enumerated *supra*.

"It is obvious that counsel made a tactical decision to focus attention at the penalty phase on Williams' confession, the object being to convince the jury that Williams' life should be spared due to the fact that he had given an unsolicited confession to the police." Findings at 20 (citing Hearing Transcript at 98). Also, counsel made a tactical decision not to put certain witnesses before the jury to prevent the Commonwealth from reminding the jury of the "horrible and terrible crimes that Mr. Williams had done." Findings at 20 (citing Hearing Transcript at 157).

"With respect to investigating mitigating evidence, counsel's performance is deficient if he fails to make a reasonable investigation for possible mitigating evidence." *Matthews v. Everett*, 105 F.3d 907, 919 (4th Cir. 1997) (citing *Strickland*, 466 U.S. 668). In the *Matthews* case, the Fourth Circuit found that counsel's performance was not deficient under the *Strickland* standard, since counsel had done extensive investigation, including interviews with numerous witnesses, including the accused's family, a psychiatrist, and a psychologist. The Fourth Circuit also relied on the fact that, at sentencing, counsel called numerous witnesses, focusing on the accused's poor upbringing, poor performance in school, low I.Q., and adaptability to prison life.

Motley failed to made any such reasonable investigation on behalf of Williams. Motley did not even attempt to obtain Williams' juvenile records and records from Danville social services, not because he didn't believe these records would be important, but simply because he incorrectly believed that "state law didn't permit it." Hearing Transcript at 64. Motley later acknowledged that he believed that information about Williams' troubled life as a child would have been very important mitigating evidence. *Id.* Motley did not attempt to obtain Williams' prison records, either, even though the Supreme Court has held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).[7] Bruce Elliott, the Danville CPA who

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[7] The Court notes that Williams assisted in breaking up a prison drug ring while incarcerated at a time prior to the

had befriended Williams, took the initiative to call Motley and offer to testify as a character witness on Williams' behalf. Motley simply failed to return Elliott's phone call.

Motley's proffered "tactical" reasons for not offering certain mitigating evidence are unpersuasive. First, Motley testified that he decided to focus on Williams' voluntary confession. While deciding to focus on this piece of evidence is supportable as a tactical decision, focusing on it to the exclusion of all other mitigating evidence is unreasonable. "[T]he sentencer in all but the rarest kind of capital case [should] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (emphasis in original). *See also Clark v. Townley,* No. 85-6601 (4th Cir. June 5, 1986) (In a case nearly identical to the one bar, the Fourth Circuit upheld the district court's grant of habeas relief because trial counsel failed to introduce mitigating evidence that petitioner had a very difficult childhood). Second, Motley testified that he did not want to offer additional character witnesses because their testimony would open the door to cross-

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penalty phase of the trial. This evidence, probative of Williams' "future dangerousness" was available for counsel's use at the sentencing phase. This case is thus unlike *Evans v. Muncy,* 916 F.2d. 163 (4th Cir. 1990) where the petitioner argued that evidence demonstrating he played in significant role in quelling a prison uprising which occurred after he had been sentenced to death entitled him to a new sentencing hearing.

examination which would surely consist of further recitations of the "horrible crimes" which Williams had committed. This argument would be reasonable if Motley had not offered three character witnesses at sentencing, all of whom were already asked if they were aware of Williams' other crimes. Also, since Motley failed to even obtain a proffer from Bruce Elliott and failed to question Williams' wife and daughter who were present throughout the trial, he did not have the information necessary to make an *informed* tactical decision. *See Clark v. Townley*, No. 84 Civ. 1271-AM, slip op. at 13-14 (E.D. Va. June 24, 1985).

Finally, the Court notes an important distinction between this case and *Strickland*, 466 U.S. 668. Petitioner in the *Strickland* case chose to be sentenced by the trial judge, instead of by the jury. Petitioner's attorney decided to offer no mitigating evidence. He chose, instead, to rely on the trial judge's reputation as one "who thought it important for a convicted defendant to own up to his crime" and who would show mercy to a defendant who had accepted responsibility for his crime. *Strickland*, 466 U.S. at 673. Motley was faced with a quite different tactical decision by virtue of the fact that the mitigating evidence had to convince only one juror that the death penalty was not warranted in Williams' case. Also, the attorney in *Strickland* introduced no character evidence at all, so that there would be no cross-examination. In the present case, Motley chose to introduce the testimony of four witnesses, all of whom were subject to cross-examination, but not to introduce other mitigating evidence. The introduction of the additional mitigating evidence in this case certainly would have had no negative consequences.

b. Prejudice

The determinative question under the prejudice prong of the *Strickland* test is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Virginia Code § 19.2-264.4(E) provides that "In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Thus, the Petitioner only had to persuade one of the twelve jurors to hold out for mitigation. Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence, and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

The Court finds error both in the Virginia Supreme Court's reliance on *Lockhart*, and in the Virginia Supreme Court's recitation of the facts in this case. First, the Virginia Supreme Court relied upon *Lockhart* in finding that Motley's failure to introduce the foregoing evidence was not prejudicial. The Virginia Supreme Court rejected Williams' argument that there "is a 'reasonable probability' that had at least one juror heard any of this evidence – let alone all of this evidence – the outcome of the case would have been different." The Virginia Supreme Court stated that "[t]he prisoner's discussion flies in the face of the

Supreme Court's admonition in *Lockhart* that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' " *Williams*, 487 S.E.2d at 199 (citing *Lockhart*). The Virginia Supreme Court quoted a portion of the *Lockhart* decision, stating, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." *Id.* at 198 (citing *Lockhart*, 506 U.S. at 369-70).

The *Lockhart* case is clearly distinguishable from the case before this Court. In the *Lockhart* case, the Supreme Court was faced with the question "whether counsel's failure to make an objection in a state criminal sentencing proceeding – an objection that would have been subsequently overruled – constitutes 'prejudice' " within the meaning of *Strickland*. *Lockhart*, 506 U.S. at 366. The Court found that, since prejudice is not determined under the laws existing at the time of trial, the petitioner was not actually deprived of any rights (i.e., at the time of the Supreme Court's decision, counsel would not have been entitled to make such an objection).

Justice O'Connor's concurrence makes clear the scope of the Court's decision in *Lockhart*:

> [T]oday's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," remains unchanged. This

> case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Justice O'Connor went on to quote *Strickland*, stating that certain factors, such as the possibility of mistake, "whimsy", "arbitrariness" or "the luck of a lawless decisionmaker" cannot be taken into account. *Id.* at 346-47 (quoting *Strickland*). Since *Strickland*, O'Connor notes, the Supreme Court has recognized that "neither the likely effect of perjured testimony nor the impact of a meritless Fourth Amendment objection is an appropriate consideration in the prejudice inquiry." *Id.* at 347.

> Today the Court identifies another factor that ought not inform the prejudice inquiry. Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission. . . . Consequently, respondent's claim of prejudice was based not on the allegation that he was denied an advantage the law might permit him. It was predicated instead on the suggestion that he might have been denied "a right the law simply does not recognize," namely the right to "have the state court make an error in his favor."

Id. at 374-75 (citation omitted).

Williams' case is quite different. Williams is entitled, by current law, to have all possible mitigating evidence

put before the sentencing jury. Williams has demonstrated that there was significant additional Mitigating evidence that was not offered to the jury at sentencing. Williams has satisfied the prejudice inquiry by showing, not only a reasonable probability that "the outcome would have been different but for counsel's error," but, unlike *Lockhart*, also that counsel's failure to introduce mitigating evidence was a right the law *does* recognize. Accordingly, the Virginia Supreme Court's decision involved an unreasonable application of *Lockhart* and the *Strickland* standard.

Second, the Court notes that, while the Virginia Supreme Court properly set forth the facts of the case in its opening summary of the case, it made an error of fact in discussing its finding of no prejudice. Specifically, the Virginia Supreme Court found no prejudice, reasoning: "The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment." *Williams*, 487 S.E.2d at 200. The Virginia Supreme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity. It is also unreasonable to characterize the additional evidence as coming from "mostly relatives." As stated, *supra*, Bruce Elliott, a respected professional in the community, and several correctional officers offered to testify on Williams behalf.

Accordingly, the Court finds that Williams was not afforded effective representation at the sentencing stage of his trial. The sentence of death imposed on November 19, 1986 will be vacated, and it will be ordered that Petitioner shall be resentenced pursuant to Virginia Code § 19.2-264.3(C).

4. Alleged failure to bar testimony at sentencing of Drs. Centor and Ryans[8]

Petitioner argues that trial counsel was ineffective in failing to bar the use of Dr. Centor's and Dr. Ryan's expert testimony. In support of his argument, Petitioner asserts that he never gave notice to the Commonwealth that he intended to use expert testimony at sentencing and therefore never "opened the door" to the use of expert testimony by the prosecution. Petition for Writ of Habeas Corpus at 42.

Petitioner relies on Virginia Code § 19.2-264.3:1(G), which provides:

> No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be

[8] Petitioner's Claim I(B)(2).

> introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

The circuit court found that both Ryans' and Centor's opinions on future dangerousness were based on Williams' prior conviction record and not on any statement made to them by Williams, and thus no violation of Va. Code § 19.2-264.3:1(G) occurred. Findings at 23. The circuit court's decision was not based on an unreasonable determination of the facts nor did it involve an unreasonable application of the *Strickland* standard. Accordingly, the Court dismisses this claim.

5. Alleged failure – to conduct meaningful cross-examination of Drs. Centor and Ryans[9]

Petitioner claims that defense counsel's failure to cross-examine Drs. Centor and Ryans in any meaningful way prejudiced Petitioner. In the state court, Petitioner specifically argued that defense counsel should have cross-examined Drs. Centor and Ryans regarding the first report they prepared, which opined that there was a "low probability that [Williams] would commit criminal acts of violence" in the future. Findings at 22-23 (citing Hearing Transcript). The state court found that this claim was without merit because, "had counsel sought to cross-

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[9] Petitioner's Claim I(B)(3).

examine these experts on their initial report, the commonwealth would have pointed out on redirect that the initial report was completed before the experts were aware of Williams' criminal history, giving the Commonwealth the opportunity to recount that history yet again." The state court's finding of adequate performance is not an unreasonable application of the *Strickland* standard. Accordingly, the Court dismisses this claim.[10]

6. Counsel's closing arguments[11]

Petitioner argues that trial counsel was ineffective in focusing on the "horrible" nature of the crime rather than on mitigating factors. The state court found:

> At the penalty phase of the trial, counsel followed a strategy of asking the jury to spare his client's life despite the crimes that he had committed. He argued that Williams had a heart and that he had a conscience. Counsel emphasized to the jury that it was Williams who surrendered himself to the police, and confessed to his crimes. Counsel argued, quite reasonably, that people who admit their wrongs should receive favorable consideration. The jury already was well aware of the crimes that Williams has committed, and the nature of those crimes. Counsel followed a reasonable strategy in confronting those circumstances up front and then arguing for a life sentence, based on the

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[10] The Court notes that Petitioner also raises claims of failure to introduce certain mitigating evidence. These claims are addressed, *supra*, at 19-33.

[11] Petitioner's Claim I(B)(5).

> fact that Williams had confessed to his crimes. Under the circumstances of this case, this Court finds that counsel's arguments . . . were within the range of effective performance.

Findings at 27.

"In considering whether counsel's closing argument was ineffective, we consider the closing statements in their entirety. . . . Furthermore, counsel may make strategic decisions to acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury." *Carter v. Johnson*, 131 F.3d 452 (5th Cir. 1997) (citing *Strickland v. Washington*) (habeas case in which the petitioner claimed that defense counsel demonstrated a "personal antipathy" toward him during their closing arguments in the punishment phase of the trial).

Defense counsel's choice to acknowledge that Williams' crimes were "horrible" could certainly be viewed as a reasonable tactical decision. Accordingly, the state court's decision was a reasonable application of the *Strickland* standard.

7. Jury Instructions[12]

Petitioner claims that counsel unreasonably failed to request a jury instruction designed to ensure that the jury understood the meaning and role of mitigation evidence.

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[12] Petitioner's Claim I(B)(6)

The jury instruction given at trial, No. 14 (Trial Transcript, Joint Appendix, Vol. II at 845), addresses mitigation evidence and is identical to the jury instruction approved by the Fourth Circuit in *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984). Accordingly, the Court cannot say that counsel's performance was deficient in failing to request a different instruction on mitigating evidence.

B. Failure to Prove Cause of Death[13]

Upon first examining the dead body of Stone, the local medical examiner opined that the cause of death was natural, either heart failure or alcohol poisoning. He testified that his opinion was "somewhat [a] guess because there was no autopsy." Almost six months later, Stone's body was exhumed and a regional medical examiner conducted an autopsy. At trial, the regional medical examiner opined that Stone's death was caused by being struck in the chest with blunt force. Petitioner argues that this evidence does not provide competent proof of the cause of death.

On direct appeal, the Supreme Court of Virginia held that the corpus delicti was adequately established as to the cause of death. *Williams v. Commonwealth*, 360 S.E.2d 361, 366 (Va. 1987). "The alleged conflict in the testimony of these two experts was a matter for the jury to resolve. . . . No litigant is bound by contradicted testimony of a witness even though proffered by the litigant. The jury must resolve any conflict between the witnesses." *Id.* (citing *Travis v. Bulifant*, 306 S.E.2d 865, 866

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[13] Petitioner's Claim II(A).

(Va. 1983); *Opanowich v. Commonwealth*, 83 S.E.2d 432, 440 (Va. 1954); *Massie v. Firmstone*, 114 S.E. 652, 656 (Va. 1922)).

The Court further notes that Williams' confession was an important piece of evidence in the murder case. When a defendant has fully confessed a crime, "only slight corroborative evidence is necessary to establish the corpus delicti." *Clozza v. Commonwealth*, 321 S.E.2d 273, 279 (Va. 1984).

Since the Court may not disturb the Virginia Supreme Court's interpretation of Virginia law, the Court may only determine whether the evidence as characterized by the Virginia court represents "an unreasonable determination of the facts in light of evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(2). The Court holds that the Virginia Supreme Court reasonably determined the facts and that those facts are sufficient to allow a reasonable trier of fact to determine the cause of death.

D. Failure to Prove the Robbery[14]

The Virginia Supreme Court found that there was sufficient evidence of the robbery. Shortly after Stone's body was discovered fully clothed, the wallet was found to be missing from the rear pants pocket. The police thoroughly searched the house, but the wallet was never found. Stone's daughter testified, "I knew it was something he didn't do was take his wallet out of his pocket.

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[14] Petitioner's Claim II(B).

Even when he would go to bed at night he would take his pants off and hang them on the foot of the bed, but his pants pocket would still be fastened . . . [w]ith his wallet." *Williams*, 360 S.E.2d at 366. "This evidence, coupled with Williams' confession that he took the wallet from the decedent's pocket after killing him, removed some money, and then threw the wallet into a river, corroborates the corpus delicti of the robbery." *Id.* Again, the Court holds that the Virginia Supreme Court reasonably determined the facts and that those facts are sufficient to allow a reasonable trier of fact to find Williams guilty of the robbery of Stone.

E. Admission of Petitioner's Statements to Police[15]

Petitioner claims that his statements to the police were not voluntarily made. Williams actually initiated contact with the police with regards to the Stone case. When incarcerated on another charge, Williams wrote a letter to the chief of police confessing to the murder of "that man Who Die on Henry St." Williams was subsequently interviewed, after he told police that his conscience was bothering him and he wanted to talk to somebody. He offered both a taped and a written statement. After giving these statements, he spoke with his mother. His mother apparently told him that he "had no blood on him" and that he couldn't have murdered Stone. Williams then attempted to recant his statements, saying that they were just dreams that he had had. Williams suggests that he was very troubled by these dreams and

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[15] Petitioner's Claim III.

that he just wanted "help." He argues that he was coerced into confessing by the promise that he would receive psychological help. Williams also argues that his various confessions are internally inconsistent, and that his questioners "suggested" details to him which he then incorporated into his confessions.

The Virginia Supreme Court upheld the trial court's finding that Williams' confessions were voluntary and that he was competent to make statements to the police, and rejected the argument that police induced the confession by promise of reward. The state court's ruling is neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent, and federal relief is therefore prohibited.

F. Evidence Concerning the Stroud Conviction[16]

Petitioner claims that introduction of evidence concerning a brutal assault on an elderly woman by Williams shortly after Stone's murder that resulted in a malicious wounding conviction "served only to inflame the passion of the jury such that the decision to impose the death sentence was based on caprice or emotion rather than reason in violation of petitioner's rights under the Eighth and Fourteenth Amendments." Petition for Habeas Corpus at 86.

The Virginia Supreme Court held that the details of that malicious wounding were highly relevant in assessing Williams' "future dangerousness." The Virginia

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[16] Petitioner's Claim IV.

Supreme Court cited Va. Code § 19.2-264.4(B), stating, "We have construed this statute to authorize the introduction of the *details* of other criminal conduct." *Williams*, 360 S.E.2d at 370 (emphasis added).

This Court may not disturb the Virginia Court's interpretation of Virginia law, and finds that the Virginia Supreme Court reasonably determined the facts with regard to this claim.

G. Claims Concerning the Prosecutor's Arguments[17]

Petitioner claims that his sentence of death was imposed after consideration of an improper argument by the prosecutor. Specifically, the prosecution was allowed to argue at sentencing, over objection, that Petitioner's "not guilty" plea evinced a lack of remorse for the crime so as to justify the imposition of the death penalty. Petition for Habeas Corpus at 89. The Virginia Supreme Court found that the prosecution's argument should not have been permitted, but that it did not prejudice the defendant's status before the jury. *Williams*, 360 S.E.2d at 369. "At most it was an effort to capitalize on the allegedly inconsistent positions taken by defense counsel. We believe the jury understood this as 'lawyer talk' and had the common sense to treat it as such." *Id.* Again, this Court cannot address the Virginia state law issue[18], and

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[17] Petitioner's Claim V.

[18] In his state petition, Williams also asserted this claim as a violation of his federal constitutional rights. The state court's ruling that this claim was defaulted under *Slayton v. Parrigan* precludes federal relief.

holds that the Virginia Supreme Court reasonably determined the facts.

Petitioner also argues that the prosecutor improperly argued before the trial court at the sentencing hearing that Williams' plea of not guilty was also a denial of his confession, indicating a continued lack of remorse. The Virginia Supreme court held that "a plea of not guilty also contests the validity and admissibility of a confession." *Id.* at 369. The Court noted also that the argument was before the court and not the jury. "A trial judge is uniquely capable because of his training, experience and judicial discipline to disregard potentially prejudicial argument during the mental process of adjudication. . . . We must assume that the trial judge did not penalize Williams because he pled not guilty and denied his confession in the suppression hearing, but merely considered those matters as evidence of Williams' recent attitude about this crime and his other criminal activities." *Id.* With regards to the prosecutor's argument before the judge, this Court also holds that the Virginia Supreme Court reasonably determined the facts.

H. Argument on the Meaning of a Life Sentence[19]

Finally, Petitioner Claims that the trial court's refusal to permit defense counsel to argue to the jury in the sentencing phase of the proceedings the meaning of a life sentence violated his due process rights under the Fourteenth Amendment and right not to be sentenced to death arbitrarily under the Eighth Amendment. Petitioner for

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[19] Petitioner's Claim VI.

Habeas Corpus at 94. Specifically, defense counsel attempted to argue that a life sentence meant Williams would be "away from the public for the rest of his life." Trial Transcript at 681. The Commonwealth's Attorney objected to the argument because under Virginia law Williams would have been parole eligible in approximately twelve and a half years. *Id.* at 682. The trial court sustained the objection. *Id.* at 683. Petitioner raised this issue on direct appeal only as a matter of state law. The Virginia Supreme Court ruled that "[i]f the jury is not to be concerned with what may later happen to a defendant sentenced to the penitentiary, no inference can be drawn or argued one way or the other as to whether he will serve his full term." *Williams*, 360 S.E.2d 368. The court stated that this type of argument is improper in the same way as permitting the Commonwealth to argue possible parole release as a means to increase the defendant's sentence is improper. *Id.* "A reduced sentence is not the responsibility of the judiciary but of the executive department." *Id.* The Supreme Court's ruling on the state law issue presented is conclusive, and Petitioner does not argue that the Court made any mistake of fact. Accordingly, relief on this claim is denied.

Conclusion.

For the reasons set forth above, William's Petition for Writ of Habeas Corpus is GRANTED in part and DENIED in part. The sentence of death imposed on November 19, 1986 will be vacated, and it will be ordered that the Petitioner shall be resentenced pursuant to Virginia Code § 19.2-264.3(C).

Also, for these reasons, the Court finds that Petitioner's Motions for Discovery, Appointment of Experts, and to Transfer Petitioner for Medical Evaluation are not warranted and, accordingly, are DENIED.

/s/ James C. Cacheris
United States District Judge

April 7th 1998
Alexandria, Virginia

163 F.3d 860

Terry WILLIAMS, Petitioner-Appellee,

v.

John TAYLOR, Warden, Sussex I State Prison,
Respondent-Appellant.
Terry Williams, Petitioner-Appellant,

v.

John Taylor, Warden, Sussex I State Prison,
Respondent-Appellee.

Nos. 98-14, 98-16.

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 24, 1998.

Decided Dec. 18, 1998.

ARGUED: Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Ellen O. Boardman, O'Donoghue & O'Donoghue, Washington, D.C., for Appellee. ON BRIEF: Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. Brian A. Powers, Dinah S. Leventhal, O'Donoghue & O'Donoghue, Washington, D.C., for Appellee.

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge WILLIAMS wrote the opinion, in which Judge WIDNER and Judge MICHAEL joined.

OPINION

WILLIAMS, Circuit Judge:

On September 30, 1986, a Virginia jury convicted Terry Williams of the capital murder of Harris Thomas Stone. Following the jury's determination that Williams presented a future danger to society, the trial court sentenced Williams to death. After exhausting all available state remedies, Williams petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West Supp.1998). The district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective because they failed to present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the writ was erroneously granted.[1] We agree. The Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective during the sentencing phase of Williams's trial was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. As a result, Williams is not entitled to habeas relief

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[1] Williams named Sam Pruett, Warden of the Mecklenburg Correctional Center, as Respondent in his petition. When Fred W. Greene replaced Pruett as Warden, Greene was substituted for Pruett as Respondent. Thereafter, Williams was transferred to the Sussex I State Prison. As a result, John Taylor, Warden of the Sussex I State Prison, was substituted for Greene as Respondent. Because of the numerous changes, we refer to Respondent as "the Commonwealth" throughout this opinion.

under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[2] *See* 28 U.S.C.A. § 2254(d) (West Supp.1998). Moreover, we conclude that none of the claims raised in Williams's cross-appeal provide a basis for federal habeas relief. Accordingly, we affirm in part and reverse in part.

I.

As recited by the Virginia Supreme Court, the undisputed facts are as follows:

> Stone, an elderly man who resided on Henry Street in Danville, was found dead in his bed shortly before 2:00 a.m. Sunday, November 3, 1985. There was no sign of a struggle, no blood was observed on Stone's body, and he was fully clothed. Despite a diligent search, Stone's wallet, which he customarily kept fastened in the back pocket of his pants, was never found.
>
> The local medical examiner, who examined the body [at] about 9:30 that Sunday morning, noted an abrasion on the chest, but no bruising. Stone's history of heart disease and the police

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[2] Williams filed his petition for a writ of habeas corpus on December 12, 1997, more than one year after the enactment of the AEDPA. *See* Pub.L. No. 104-132, 110 Stat. 1214 (enacted on April 24, 1996). As a result, § 104 of the AEDPA, which amended 28 U.S.C.A. § 2254(d) (West Supp.1998), applies to this appeal. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2067-68, 138 L.Ed.2d 481 (1997) (holding that the new habeas standards of review do not apply to habeas petitions pending in federal court prior to the enactment of the AEDPA); *Green v. French*, 143 F.3d 865, 868 (4th Cir.1998) (applying AEDPA to capital habeas petition filed after the enactment of the AEDPA).

failure to report anything suspicious about the circumstances of Stone's death led the local medical examiner to conclude that Stone's death was due to heart failure. However, when Stone's blood alcohol content was later analyzed and was reported to be 0.41%, the regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning. Stone's daughter testified Stone looked "a little high" when she last saw him entering his house shortly after 6:00 p.m. on Saturday, November 2, 1985.

When the funeral director, Jack Miller, observed Stone's body on Monday morning, he called a bruise or abrasion over the left ribs to the attention of the police. The police told Miller that the local medical examiner believed the bruise was an old one. Though Miller disagreed with the local medical examiner, on instructions from the police he embalmed the body.

Almost six months later, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author admitted killing "that man Who Die on Henry St." The police interviewed Williams, an inmate of the Danville jail at the time, who eventually admitted that he had written the letter and later gave multiple confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet.

Stone's body was exhumed. On July 2, 1986 Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened

> the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361, 363-64 (Va.1987).

After a jury trial in the Circuit Court of the City of Danville, Virginia, Williams was convicted of the capital murder of Mr. Stone. Based on its finding of future dangerousness, *see* Va.Code Ann. § 19.2-264.4(c) (Michie Supp.1998), the jury recommended that Williams be sentenced to death. Following the jury's recommendation, the trial court sentenced Williams to death. On direct appeal, the Virginia Supreme Court affirmed Williams's conviction and death sentence. *See Williams*, 360 S.E.2d at 363-64. The United States Supreme Court denied Williams's petition for a writ of certiorari. *See Williams v. Virginia*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Williams filed a habeas corpus petition in the Danville Circuit Court on August 26, 1988. After a hearing, the Danville Circuit Court dismissed the majority of Williams's claims. Almost seven years later, Williams amended his habeas petition to include several claims that his trial counsel were ineffective. In June 1995, the Danville Circuit Court held an evidentiary hearing on the issue of ineffective assistance of trial counsel.

Prior to any action on the hearing, however, jurisdiction over the habeas petition was transferred to the Virginia Supreme Court. *See* Va.Code Ann. § 8.01-654(C)(1)

(Michie Supp.1998) (providing that the Virginia Supreme Court has "exclusive jurisdiction" to consider writs of habeas corpus with respect to prisoners under a death sentence). By order dated May 6, 1996, the Virginia Supreme Court directed the Danville Circuit Court to report its findings of fact and conclusions of law relating to the ineffective assistance of counsel claims addressed at the June 1995 evidentiary hearing. *See id.* (providing that the circuit court that entered the sentence of death may conduct an evidentiary hearing "only if directed to do so by order of the Supreme Court").

On August 15, 1996, the Danville Circuit Court forwarded its Findings of Fact and Recommended Conclusions of Law (the Report) to the Virginia Supreme Court. The Danville Circuit Court found that trial counsel's "performance at the guilt phase of the trial was both professional and competent." (J.A. at 1055.) Of particular importance here, the Danville Circuit Court concluded that trial counsel properly handled the court-appointed mental health experts, and that lead trial counsel, E.L. Motley, was not suffering from a mental impairment during the course of his representation of Williams.

The Danville Circuit Court did conclude, however, that trial counsel's failure to present certain mitigating evidence during the sentencing phase of the trial warranted relief. Specifically, the Danville Circuit Court found that trial counsel failed to investigate and present (1) Williams's juvenile commitment records from the Beaumont Correctional Center, (2) records, including statements from Williams's siblings, that provided a summary of Williams's early home life, (3) the testimony of Williams's estranged wife and eleven-year-old daughter,

and (4) the testimony of Williams's friend Bruce Elliot. According to the Report, had this evidence been developed and presented at the sentencing phase of Williams's trial, the jury would have learned that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded." (J.A. at 1059-60). Continuing, the Report stated that the evidence in question would have shown that Williams's "conduct had been good in certain structured settings in his life (such as when he was incarcerated) and . . . that he had redeeming qualities." (J.A. at 1060.) In summary, the Danville Circuit Court found that the mitigating evidence probably would have been given weight by at least one member of the jury. Because one juror would have been the difference between life and death, the Report ultimately concluded that Williams was prejudiced by trial counsel's failure to make use of the mitigating evidence.

Both the Commonwealth and Williams filed objections to the Report. The Commonwealth argued that trial counsel were not ineffective during the sentencing phase of Williams's trial for making a tactical decision not to introduce evidence that was just as likely to operate to Williams's disadvantage. Williams, in contrast, argued that the Danville Circuit Court erred in finding that his trial counsel were effective during the guilt phase of his trial. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one issue that the Danville Circuit Court found warranted relief, and adopted the Danville Circuit Court's recommendation that the other claims be dismissed.

On June 6, 1997, the Virginia Supreme Court unanimously rejected the Danville Circuit Court's finding that trial counsel's failure to present certain mitigating evidence during the sentencing phase warranted relief. *See Williams v. Warden*, 487 S.E.2d 194 (Va.1997). In so holding, the Virginia Supreme Court reviewed Williams's ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), and, to a lesser extent, *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993). After assuming that Williams's trial counsel's performance was deficient, the Virginia Supreme Court concluded that Williams failed to demonstrate prejudice.

On December 12, 1997, Williams filed a habeas corpus petition pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Eastern District of Virginia. In his petition Williams argued, among other things, that his counsel were ineffective in several respects. On April 7, 1998, the district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective for failing to present evidence in mitigation of punishment during the sentencing phase of Williams's trial. In so ruling, the district court specifically concluded that the Virginia Supreme Court's application of *Strickland* and Lockhart was unreasonable. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the district court erred in granting Williams federal habeas relief. In particular, the Commonwealth argues that the Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective was neither contrary to, nor an unreasonable application of, clearly established

Supreme Court precedent. In his cross-appeal, Williams contends: (1) that his lead trial counsel's mental illness rendered his assistance constitutionally ineffective, and (2) that his trial counsel's failure to handle properly several matters related to his court-appointed mental health experts rendered their assistance constitutionally ineffective. We address the Commonwealth's and Williams's arguments in turn.

II.

Before we address the merits of either the Commonwealth's appeal or Williams's cross-appeal, we must first determine the applicable standard of review. The Antiterrorism and Effective Death Penalty Act of 1996 provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp.1998). We recently interpreted subsection (1) to prohibit the issuance of the writ unless (a) the state court decision is in "square conflict"

with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.*

Williams contends, however, that we erroneously construed § 2254 in *Green v. French*.[3] Thus, Williams argues that the standard of review adopted in that case should not be followed here. This argument need not detain us long. "It is well established that a decision of this Court is binding on other panels unless it is overruled by a subsequent en banc opinion of the Court or an intervening decision of the United States Supreme Court." *Smith v. Moore*, 137 F.3d 808, 821(4th Cir.) (citing Industrial *Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir.1997)), *cert. denied*, 119 S.Ct. 199 (1998). Neither the en banc Court nor the United States Supreme Court

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[3] Williams also contends, albeit in a cursory fashion, that the *Green v. French* standard of review violates both the Suspension Clause and Article III of the Constitution. To the extent these claims are properly before us, *see Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 973 (4th Cir.1997) (holding that issues not fully briefed are deemed waived on appeal), the identical claims were raised and rejected in *Green v. French*, 143 F.3d 865, 874-76 (4th Cir.1998).

has overruled (or even called into question) the standard of review adopted by this Court in *Green v. French*. Indeed, since *Green v. French* was decided, we have applied the new standard in *Fitzgerald v. Greene*, 150 F.3d 357, 362 (4th Cir.1998), *Wright v. Angelone*, 151 F.3d 151, 156 (4th Cir.1998), and *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.1998). As a consequence, the standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit.

III.

Although the Virginia Supreme Court unanimously found that Williams's trial counsel were not ineffective, *see Williams v. Warden*, 487 S.E.2d 194, 200 (Va.1997), the district court concluded that the Virginia Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993), in finding no prejudice. In addition, the district court found that the Virginia Supreme Court "made an error of fact in discussing its finding of no prejudice." (J.A. at 1102.) Finding that Williams's trial counsel were constitutionally ineffective for failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial, the district court ordered that the writ be granted.[4] In contrast to the district court,

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[4] The district court identified the same allegedly mitigating evidence cited by the Danville Circuit Court: (1) Williams's juvenile commitment records from the Beaumont Correctional Center, (2) records, including statements from Williams's siblings, that provided a summary of Williams's early home life,

we conclude that the Virginia Supreme Court's finding of no prejudice was neither based on an unreasonable application of the tests set forth by the United States Supreme Court in *Strickland* and Lockhart for determining prejudice, nor based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court.

A.

In *Strickland*, the Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 690. First, Williams must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. *See id.* at 687-91, 104 S.Ct. 2052. This, however, is no simple task. A court's review of counsel's performance is "highly deferential." *Id.* at 689, 104 S.Ct. 2052. Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. *See id.* If Williams is able to demonstrate that his trial counsel's performances were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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(3) the testimony of Williams's estranged wife and eleven-year-old daughter, and (4) the testimony of Williams's friend Bruce Elliot. In addition, the district court identified Williams's prison commendations for returning a guard's wallet and for identifying members of a prison drug gang. The Danville Circuit Court attached no significance to Williams's prison commendations.

Id. at 694, 104 S.Ct. 2052. As a result, Williams's trial counsel may be deemed ineffective only if their "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. 2052.

In Lockhart, the Supreme Court clarified the meaning of prejudice under *Strickland*. *See Lockhart*, 506 U.S. at 369-70, 113 S.Ct. 838. Although the Supreme Court in *Strickland* focused primarily on whether "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, the Supreme Court in Lockhart clarified that "an analysis focusing solely on mere outcome determination . . . is defective," *Lockhart*, 506 U.S. at 369. Instead, a proper prejudice analysis must consider "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.* As a result, a court may not "set aside a conviction or sentence solely because the outcome would have been different but for counsel's error." *Id.* at 369-70, 113 S.Ct. 838.

The Virginia Supreme Court assumed, without deciding, that Williams's trial counsel's performance fell below an objective standard of reasonableness. *See Williams v. Warden*, 487 S.E.2d 194, 198 (Va.1997) (concluding that it was "easier to dispose of [Williams's] ineffectiveness claim on the ground of lack of sufficient prejudice"). The district court, however, concluded that Williams's trial counsel were, in fact, deficient. Like the Virginia Supreme Court, we will assume, without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. Despite assuming that Williams's trial

counsel were objectively unreasonable in failing to introduce the evidence in question, we cannot say that the Virginia Supreme Court's decision that Williams was not prejudiced thereby was an unreasonable application of the tests developed in either *Strickland* or *Lockhart* for determining prejudice. The Virginia Supreme Court's analysis on this point is as follows:

> [Williams's argument] flies in the face of the Supreme Court's admonition in *Lockhart*, [506 U.S. at 364, 113 S.Ct. 838], that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."
>
> We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused. The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.
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> The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and

robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.

Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.

While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, 104 S.Ct. 2052 the

> predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates.
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> What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700, 104 S.Ct. 2052. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Williams v. Warden, 487 S.E.2d 194, 199-200 (Va.1997).

According to the district court, the Virginia Supreme Court's application of the *Strickland* prejudice standard was unreasonable because there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented. (J.A. at 1099 (noting that

Va.Code Ann.§ 19.2-264.4(E)) provides that a death sentence must be unanimous). For the reasons that follow, we disagree.

To the extent the district court suggests that a capital defendant faces a less rigorous standard for determining prejudice than a noncapital defendant, it is simply mistaken. A court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052(noting that a finding of prejudice does not "depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency"). Rather, the *Strickland* prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice.

Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by counsel's actions. Evidence that Williams presented a future danger to society was simply overwhelming. The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw. Because a significant portion of the allegedly mitigating evidence also painted Williams as a recidivist who was likely to commit future offenses, the Virginia Supreme Court's conclusion that there was not

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052 was not unreasonable.

The district court also concluded that the Virginia Supreme Court's application of *Lockhart* was unreasonable. Specifically, the district court held that the prejudice standard developed in *Lockhart* applies only in " 'the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not to inform the inquiry.' " (J.A. at 1101 (quoting *Lockhart*, 506 U.S. at 373) (O'Connor, J., concurring)). Because Williams sought to demonstrate prejudice based on trial counsel's failure to present mitigating evidence, which, by current law, Williams was entitled to put before the sentencing jury, the district court determined that the standard developed in *Lockhart* was inapplicable.

The district court, we believe, construed *Lockhart* far too narrowly. Although Justice O'Connor would limit the prejudice analysis contained in *Lockhart* to the "unusual" case, Chief Justice Rehnquist, writing for the majority, made no such disclaimer. Indeed, as the *Lockhart* majority made clear, the requirement that a criminal defendant alleging prejudice show that the result of the proceeding was unfair or unreliable was the rule, not the exception. *See Lockhart*, 506 U.S. at 369, 113 S.Ct. 838. In fact, the Supreme Court in *Strickland* concluded its analysis by noting that the defendant "made no showing that . . . his sentence was rendered unreliable," or that his "sentencing proceeding was . . . fundamentally unfair." *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052. Thus, *Lockhart*'s emphasis

on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*. *Accord United States v. Prince*, 110 F.3d 921, 925 (2d Cir.) (noting that " 'analysis focusing solely on mere outcome determination . . . is defective' " (quoting *Lockhart*, 506 U.S. at 368, 113 S.Ct. 838)), *cert. denied*, ___ U.S. ___, 118 S.Ct. 188, 139 L.Ed.2d 127 (1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir.1996) (stating that the Supreme Court in *Lockhart* clarified the meaning of prejudice), *cert. denied*, 117 S.Ct. 2422 (1997); *Hays v. Alabama*, 85 F.3d 1492, 1496 (11th Cir.1996) (stating that prejudice requires a showing that counsel's errors deprived the defendant of a fair trial), *cert.denied*, ___ U.S. ___, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997); *United States v. Kissick*, 69 F.3d 1048, 1055 (10th Cir.1995) (noting that a criminal defendant must demonstrate that counsel's performance rendered the proceeding "fundamentally unfair or unreliable" to show prejudice); *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir.1995) (noting that Lockhart's fundamentally unfair or unreliable standard "clarified the meaning of prejudice under *Strickland*").

In sum, the district court erred in construing *Lockhart* based solely on Justice O'Connor's concurring opinion. The holding in *Lockhart* – that a criminal defendant must show that counsel's performance rendered the proceeding fundamentally unfair or unreliable to establish prejudice – is not limited to the "unusual" case. Indeed, the standard for prejudice set forth in *Lockhart* is not an exception to the *Strickland* standard, but rather a clarification. We note that the Virginia Supreme Court's application of *Lockhart* was consistent with how our sister circuits have applied the decision, and we cannot say that the Virginia Supreme Court's reliance on *Lockhart*, in

addition to *Strickland*, rendered its ineffective assistance of counsel analysis unreasonable under § 2254(d).

Finally, Williams contends that the Virginia Supreme Court erroneously applied a "weighing" analysis from *Strickland* in finding no prejudice. Williams's argument is based on the following passage from the Virginia Supreme Court's opinion:

> What the Supreme Court said in *Strickland* applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed."

Williams, 487 S.E.2d at 200 (quoting *Strickland*, 466 U.S. at 700), 104 S.Ct. 2052. For the reasons that follow, we conclude that the Virginia Supreme Court reasonably applied "clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C.A. § 2254(d)(1), in rejecting Williams's ineffective assistance of counsel claims.

When a death sentence is supported by an invalid aggravating factor, whether the sentence of death may stand turns on whether the jury was required to "weigh" the aggravating circumstances against the mitigating circumstances. *See Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367(1992) (noting that in a non-weighing state the jury's reliance on an invalid aggravating factor may not "infect the formal process of deciding whether death is an appropriate penalty so long as the

sentencing body finds at least one valid aggravating factor"). As a result,the term "weighing state" has become a term of art in capital cases. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Florida, for example, is a weighing state, *see Parker v. Dugger*, 498 U.S. 308, 318, 111 S.Ct. 731, 112 L.Ed.2d 812(1991), while Virginia is not, *see Tuggle v. Netherland*, 79 F.3d 1386, 1389 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 237, 136 L.Ed.2d 166 (1996). Because *Strickland* involved a Florida defendant, Williams argues that only in a "weighing state" may prejudice be determined by considering whether the aggravating evidence outweighed the mitigating evidence. We find this argument to be without merit.

First, there is no evidence that any portion of the Supreme Court's prejudice analysis in *Strickland* was meant to apply only to "weighing states," like Florida. Rather, we believe that the Supreme Court used the term "outweighed" in its ordinary sense. Indeed, the term "weighing" did not become a term of art until six years after *Strickland* was decided. *See Clemons*, 494 U.S. at 738, 110 S.Ct. 1441 (applying "weighing" as term of art in 1990). Second, this Court used the identical quotation from *Strickland* in rejecting a South Carolina defendant's claim of prejudice in a capital case, *see Plath v. Moore*, 130 F.3d 595, 602 (4th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1854, 140 L.Ed.2d 1102 (1998), and South Carolina, like Virginia, is not a weighing state, *see Smith v. Moore*, 137 F.3d 808, 815 (4th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 199, 142 L.Ed.2d 163 (1998). In fact, this Court recently used the identical quotation from *Strickland* in rejecting a Virginia defendant's claim of prejudice in a

capital case. *See Fitzgerald v. Greene*, 150 F.3d 357, 368 (4th Cir.1998) (noting that "[i]n the context of challenging a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death' " (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052)). Based upon the foregoing, we cannot say that the Supreme Court of Virginia's rejection of Williams's claim was an unreasonable application of *Strickland*.

B.

The district court also concluded that the Virginia Supreme Court "made an error of fact in discussing its finding of no prejudice." (J.A. at 1102.) Specifically, the district court took exception with the Virginia Supreme Court's characterization of the allegedly mitigating evidence as "mostly relatives, [who] thought the defendant was nonviolent and could cope well in a structured environment." *Williams*, 487 S.E.2d at 200. The district court criticized the Virginia Supreme Court for failing to mention the possible testimony of Williams's friend Bruce Elliot and several state correctional officers, and for overlooking evidence dealing with Williams's difficult childhood and limited mental capacity.

Despite the contentions of the district court to the contrary, the Virginia Supreme Court accurately described the omitted mitigation evidence that was credited by the Danville Circuit Court after the two-day evidentiary hearing. The Danville Circuit Court only identified Williams's estranged wife, daughter, siblings,

mother, and friend Bruce Elliot as possible witnesses whose testimony "was worthy of a jury's consideration." (J.A. at 1060). Thus, the Virginia Supreme Court's description of the witnesses as "mostly family members" was reasonable.[5] Moreover, the Virginia Supreme Court's description of the nature of their testimony was also reasonable. The affidavits of Williams's family members attempt to portray him as nonviolent. Similarly, Williams's friend Bruce Elliot described Williams as nonviolent, proud of his accomplishments, and able to thrive in a structured environment. Because the Virginia Supreme Court's decision was not based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court, the district court erred in granting the writ. *See* 28 U.S.C.A. § 2254(d)(2) (West Supp.1998).

IV.

In his cross-appeal, Williams contends that his trial counsel were ineffective in several respects. First,

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[5] In an effort to prove that the witnesses who could have testified at Williams's sentencing hearing were not "mostly relatives," counsel for Williams provided this Court, pursuant to Local Rule 28(f) and Fed. R.App. P. 28(j), with the names of fifteen potential witnesses, only seven of whom were relatives of Williams. Despite counsel's efforts, we note that the Danville Circuit Court identified (at most) six omitted witnesses, only one of whom was not a relative. The overwhelming majority of nonrelative witnesses listed by counsel were never identified, much less credited, by the Danville Circuit Court. Accordingly, it comes as no surprise that the Virginia Supreme Court failed to consider those witnesses.

Williams argues that his lead trial counsel was mentally ill. Second, Williams argues that his trial counsel mishandled several matters related to his court-appointed mental health experts. We address these arguments in turn.

A.

Almost one year after Williams's trial, his lead trial counsel, E.L. Motley, Jr., was diagnosed with depression. Soon thereafter, Motley's depression rendered him incapable of practicing law. In fact, after a series of complaints to the Virginia Bar, Motley was forced to surrender his license. In his habeas petition, Williams contends that his Sixth Amendment right to effective assistance of counsel was violated because Motley was mentally impaired during his trial.

It is well established that the Sixth Amendment right to counsel "cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940). Rather, the Sixth Amendment guarantees criminal defendants the assistance of "a reasonably competent attorney." *McMann v. Richardson*, 397 U.S. 759, 770-71 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). As a consequence, an attorney's mental incapacity may violate his client's Sixth Amendment right to counsel. Here, however, the Danville Circuit Court specifically found, after a two-day evidentiary hearing, that Motley was not acting under a mental or emotional disability during Williams's trial:

Petitioner alleges that he was denied his Sixth Amendment right to counsel because E.L. Motley, Jr.[,] was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically Motley did not begin to have problems related to his depression until the late spring or early summer of 1987. Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.

It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

During the two years that he knew Motley, Smitherman never noticed anything about Motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams.

Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E.L. Motley was acting

> under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is based on the mental problems suffered by Mr. Motley, such claims lack merit.
>
> In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability.

(J.A. at 1022-24.) The Virginia Supreme Court adopted the Danville Circuit Court's finding and dismissed Williams's Sixth Amendment claim.

The finding that Motley's legal work was not adversely affected by his depression until after the conclusion of Williams's trial and appeal is entitled to a presumption of correctness in this federal habeas corpus proceeding. *See* 28 U.S.C.A. § 2254(e)(1) (West Supp.1998). We cannot say that the Danville Circuit Court's findings, which were adopted by the Virginia Supreme Court, are "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C.A. § 2254(d)(2) (West Supp.1998). As a result, Williams's claim is without merit and was properly dismissed by the district court.

On July 10, 1986, Dr. Centor was appointed by the trial court to examine Williams after Williams's counsel intimated that he "may lack substantial capacity to understand the proceedings against him or to assist his attorney in his own defense." (J.A. at 1038). Dr. Ryans, although not specifically appointed by the trial court, assisted Dr. Centor in evaluating Williams at the Central State Hospital. On August 13, 1986, Dr. Centor filed a report with the trial court that dealt solely with Williams's competency to plead. During the sentencing

phase, Dr. Ryans and Dr. Centor were called by the Commonwealth as witnesses. Both doctors testified, based solely on Williams's criminal history, that Williams represented a future danger to society.

In his habeas petition Williams contends that his trial counsel mishandled several matters related to Dr. Ryans and Dr. Centor, the court-appointed mental health experts. Specifically, Williams asserts that trial counsel: (1) failed to object to the dual appointment of mental health experts, (2) failed to use the court-appointed experts in violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), (3) failed to bar the Commonwealth's use of the court-appointed experts, and (4) failed to rebut the court-appointed experts' damaging testimony.

1.

First, Williams claims that trial counsel were ineffective because they failed to object to the dual appointment of mental health experts. In response, the Commonwealth argues that the claim is procedurally defaulted because it was never presented to the Virginia state courts, and, in the alternative, is without merit. We agree with the Commonwealth that this claim was procedurally defaulted. As a result, we decline to address the merits.

"In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing," a state prisoner must "exhaust" all available state remedies before he can apply for federal habeas relief. *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir.), *cert. denied*, ___ U.S. ___, 118

S.Ct. 102, 139 L.Ed.2d 57(1997); *see also* 28 U.S.C.A. § 2254(b) (West Supp.1998) (barring the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State"); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state court proceedings."). To exhaust state remedies, a habeas petitioner must present the substance of his claim to the state's highest court. *See Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Matthews*, 105 F.3d at 911. A procedural default occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

It is undisputed that Williams failed to present the substance of this claim to the Virginia Supreme Court.[6] As a result, Williams failed to satisfy the exhaustion requirement. Moreover, if this claim was presented to the Virginia Supreme Court for the first time at this juncture, it would be procedurally barred pursuant to Va.Code

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[6] Williams does not contend that the facts underlying this claim were either unknown or unavailable to him at the time he filed his amended habeas corpus petition in the Danville Circuit Court.

Ann. § 8.01-654(B)(2) (Michie Supp.1998). Under § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350,1354 n.1 (4th Cir.) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 117 S.Ct. 630, 136 L.Ed.2d 548 (1996); *see also* Va.Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Accordingly, we conclude that this claim is procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2080-81, 135 L.Ed.2d 457 (1996).

We may excuse Williams's procedural default, however, if he can demonstrate either cause for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice. *See Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (holding that if the petitioner can show cause for the state procedural default, and prejudice resulting there from, the federal courts can address the issue's merits); *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (stating that where a petitioner has suffered a fundamental miscarriage of justice a decision on the merits is appropriate without regard to a procedural default). Because Williams has not established either, his claim is not cognizable in a federal habeas petition. *See Coleman*, 501 U.S. at 750, 111 S.Ct. 2546.

2.

Next, Williams claims that trial counsel were ineffective for failing to use the court-appointed experts in violation of *Ake*. Like Williams's first claim, this claim was never raised in state court and, therefore, is procedurally defaulted. Because Williams cannot demonstrate cause for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice, this claim is not properly before us on federal habeas review. *See Gray*, 518 U.S. at 160-62, 116 S.Ct. at 2080-81.

3.

Next, Williams asserts that trial counsel were ineffective for failing to prevent the Commonwealth from calling his court-appointed experts as witnesses.[7] In particular, Williams contends that his trial counsel should have objected when Dr. Ryans and Dr. Centor testified that he was a future danger to society. As the district court noted, however, Virginia law does not necessarily bar testimony from court-appointed experts. Indeed, the testimony is admissible so long as the expert does not use

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[7] Williams does not contend that his Sixth Amendment right to counsel was violated when the Commonwealth called as witnesses his court-appointed experts. In *Smith v. Moore*, 137 F.3d 808 (4th Cir.), *cert.denied*, ___ U.S. ___, 119 S.Ct. 199 (1998), we were recently asked to determine whether "the Sixth Amendment is violated when the State calls a defense-retained psychiatrist as a rebuttal witness." *Id.* at 819. Because answering that question in the affirmative would have created a new rule of constitutional law, we had no occasion to consider it in a habeas petition. *See id.* at 820-21.

"statements or disclosure" made to him by the defendant as part of the basis for forming his opinion on future dangerousness. *See* Va.Code Ann. § 19.2-264.3. Because the experts' testimony was not based on any statements Williams made but rested solely on Williams's criminal record, any objection would have been futile. As such, trial counsel's performance was simply not deficient. Accordingly, the Virginia Supreme Court's rejection of the claim cannot be deemed an unreasonable application of *Strickland*.[8]

4.

Finally, Williams argues that trial counsel were ineffective for failing to rebut the damaging testimony of his court-appointed experts. In essence, Williams is upset that trial counsel were unable to find an expert who supported his theory of the case. This Court has made clear, however, that a criminal defendant does not have a right to favorable expert testimony. *See Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir.1989). Thus, that trial counsel were unable to rebut the damaging testimony of his court-appointed experts does not render their assistance ineffective.

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[8] The Danville Circuit Court also found that Williams's prior criminal activity alone was more than sufficient to support a finding of future dangerousness. We agree. As a result, the testimony of Dr. Ryans and Dr.Centor to the same effect was not prejudicial. Thus, even if trial counsels' performance was deficient, it would not warrant relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

V.

Because Williams has failed to provide any grounds upon which habeas relief may be granted, the decision of the district court is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

Supreme Court of The United States

No. 98-8384

Terry Williams,

Petitioner

v.

John Taylor, Warden

ON CONSIDERATION of the motion of petitioner for appointment of counsel,

IT IS ORDERED by this court that the said motion, be, and the same is hereby, granted and it is ordered that Brian A. Powers, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.

May 17, 1999

Supreme Court of The United States

No. 98-8384

Terry Williams,

Petitioner

v.

John Taylor, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1a and b, 2, and 3, presented by the petition.

April 5, 1999